

THE

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On The Cover

Scenic streets are one of the magnificent features of Magnolia Springs, a community near Point Clear, which was the site of the 2023 Alabama State Bar Annual Meeting.

—Photo by Greg Ward, Lanett

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P R E S I D E N T ' S P A G E

C. Gibson Vance
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For the past 12 months, it has been my honor to serve as president of the Alabama State Bar, and it's safe to say that I chose the scenic route over the course of this year.

Last summer, we set out on the Drive for Five – a 41-circuit tour of the state to promote our new counseling initiative, the Lawyers Helpline, which includes five free hours of counseling for all members. In May, we completed that journey. In total, more than 2,200 members turned out for our visits and CLE presentations.

Whether we met at a county courthouse, a local event space, or everyone's

favorite Mexican restaurant in town, one thing I heard at almost every visit was how nice it was to hear from bar leadership in person. In today's connected world, there are more than enough ways to communicate, but I think we all agree that nothing compares to face-to-face. The meaningful conversation, the questions, the suggestions, and the laughs we shared together gave us all a feeling of camaraderie as colleagues and members of the same profession, whether we were in a big city or a small town.

I am also proud of the fact that we had the chance to talk about mental health in an open and honest way.

Lawyers aren't immune to struggles, and well-being in our profession is more important than ever. Since last July, when we debuted the Lawyers Helpline, 45 members have taken advantage of the new counseling services we provide. While I hope we one day have a larger percentage of our members use the service, I am glad to know that 45 lawyers heard about the helpline, reached out for help, and received the very best, confidential care.

I hope that lawyers continue to break down any stigma that still exists when talking about getting the help you need. In the course of a lifetime, everyone will struggle or have a challenge with their mental well-being, just like we all have challenges with our physical well-being from time to time.

I finish my year as the 147th president of the Alabama State Bar feeling optimistic about the programs in place that will continue to improve the way we take care of ourselves so we can better serve our clients. I am happy to say that the Lawyers Helpline will continue, and our members will receive five free hours of counseling each year.

We wouldn't have accomplished these goals without the support of our Board of Bar Commissioners, many of whom helped coordinate and host our Drive for Five events in their local circuit. On each visit of the Drive for Five, I bragged on our commissioners. The important work they do requires a commitment of time, and it also requires a commitment to the bar as a whole. These elected leaders have the responsibility to make decisions that affect their own profession and the direction of the bar. I can't thank them enough for their dedication to service.

Likewise, I can say the same for my executive committee. I have said many times that I have the hardest working executive council we have ever had. Thank you to Brannon Buck, Elizabeth Smithart, Mark Boardman, Mark Debro,



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(Continued from page 189)

Carmen Howell, and Felicia Long. Without hesitation, each of them stepped up to serve and lead as well.

To my law firm – Beasley Allen – thank you for allowing me to serve the Alabama State Bar and this great profession. My law partners and our wonderful staff have supported me through every step of the past year, and I have been blessed with their wisdom and inspiration in this capacity as well the totality of my career with the firm.

Finally, I would be remiss if I didn't take a moment to mention our dedicated

staff, led by Executive Director Terri Lovell. We are fortunate to have a leader like Terri. Bar commissioners get a close-up view of the hard work of Terri and her team, but even they cannot truly appreciate all that she and our staff do. Our bar is well served by them.

This month, I will pass the gavel to Brannon Buck, and I have no doubt that the Alabama State Bar will be in good hands and on a steady course with Brannon at its helm.

As I join the ranks of the past presidents of the bar, I realize that, while

each president has different goals and initiatives, we all have one thing in common – to leave the Alabama State Bar better than we found it. I share my gratitude to you for allowing me to serve as your president during the 2022–2023 bar year. It has been an honor and privilege to have had this opportunity. May we all make the most of the opportunities we've been given to better ourselves, enhance our profession, and fulfill our role of assisting those in need. ▲

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EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



It is hard to believe this bar year is almost in the rearview mirror, and what a year it has been! This time last year, President Vance announced his plans to visit and speak to all 41 judicial circuits, and I am proud to say that we accomplished that goal!

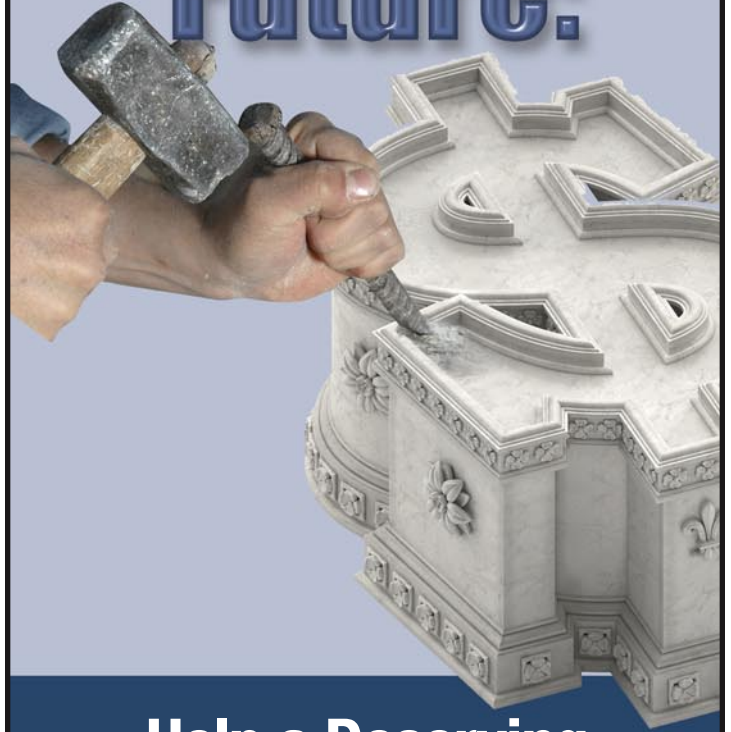
I thank Gibson for his vision and endurance to see his plans through to the end. I know each person who attended our events and CLEs saw his passion for meaningful outreach, attorney wellness, and our free counseling initiative.

We also appreciate the help of our bar commissioners and judges who helped us take the message across the state to, hopefully, help continue improving the mental health of our members.

This month, Gibson passes the baton to Brannon Buck to serve as the 148th president of the Alabama State Bar. Over the past year, Brannon has already invested countless hours helping to develop a new strategic plan, bylaws, and policies. He has been committed to ensuring the bar remains on sound and steady footing for many years to come, and we are looking forward to his continued leadership in the year ahead.

This year, 2023, marks the 100th anniversary of the formation of the Alabama State Bar as we know it today. While we began as a voluntary statewide association in 1879, the efforts of those leaders to improve the profession culminated on August 9,

Shape the Future:



1923. On that day, with the approval of an act of the Alabama Legislature, the Alabama State Bar became integrated into state government, making membership mandatory, and allowing the Supreme Court of Alabama to regulate the legal profession.

I am sure lawyers in 1923 never dreamed of the technology we'd be using in the practice of law today. It is amazing to think of the technological advances that have changed our profession over the past 100 years and consider those yet to come.

As we mark the centennial anniversary of your bar, I am reminded that we are, right now, charting the course for the next 100 years. It was important to me that, in addition to our mission and our core values, we have a vision for why we do what we do.

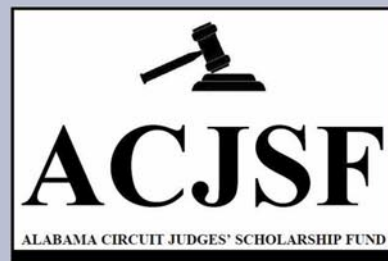
If you aren't familiar, the Alabama State Bar operates under the values of trust, integrity, and service, and I remind our staff of that each day. Our mission – to promote the professional responsibility and competence of its members, improve the administration of justice, and increase the public understanding of and respect for the law – is what we do.

Over the past few months, we have put pen to paper to develop a statement that helps us understand *why* we do what we do: "Help members be their best to better serve others." Our vision is short and simple; however, it shapes the meaning and purpose of our work.

As we look ahead to the next 100 years of service to our members and the public, I am very optimistic about the collective strengths of our elected leadership, our staff, and you – our 19,172 members – to leave a legacy that will create a vibrant future for Alabama's lawyers.

It takes hard work, courage, and strength to invest in a future beyond your own, and we stand ready and excited to write the next chapter of the Alabama State Bar. ▲

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EDITOR'S CORNER

W. Gregory Ward
wguard@mindspring.com



The legal articles in this issue were written by career prosecutors, lawyers who choose to spend their time on what many lawyers think of as *that* side of things, the criminal side.

Having never been a prosecutor, I can't say that I know precisely what their jobs are like. But it has always seemed to me that most of what they do comes from a mindset born of a mental model that manifests itself in a lifestyle. And having spent significant time with them over the years – and watching the dedication and brilliance with which I've seen them do their jobs – prosecutors are of some of the best trial lawyers I've ever known.

Bill Lisenby is a lifetime prosecutor (35 years of it, so far), and this edition wouldn't have happened without him. I've watched him work, and he is one of the best I've run across. He and those hewn in his likeness have long brought to bear the art of prosecution by striving to mingle the vinegar of firmness with the wine of grace, always looking for the intersection of justice and mercy, always working to find just the right mix.

We asked him to help develop an edition written by prosecutors. He did that, and he contributed our first article. Bill, thank you for your hard work on this edition.

So how did he do with helping us find articles?

Let's take a deep breath and dive right in.



Bill contributed our first article. Understanding the Alabama rules of evidence requires more than a lifetime of learning, and Bill directs us to a statute that otherwise would have remained unknown to most of us. The statute establishes when an out-of-court statement by an underage child victim can be admitted into evidence. The rule also extends to those with certain disabilities. And I've seen this statute applied in hearings other than criminal prosecutions.

Take note of "A Prosecutor's Tool in Child and Protected Person Victim Cases" (page 198). When you need it, you need it.

Ben Baxley is the chief of the opinions division of the Alabama Attorney General's office. Before that, he spent years

prosecuting cases. But I suspect you would have guessed that he hails from the prosecution side of things from the title of his article, "Hard Time – A Return to Mandatory Minimums" (page 202).

Ben gives us a quick tour around Alabama's history with the use of mandatory minimum sentences – the idea that a conviction for certain crimes carries with it a required sentence length, a mandatory minimum – and he explains where we are now. Whether you prosecute or defend criminal cases, Ben has information that you need to know.

Ryan Shaw is another assistant attorney general and he, too, works in the opinions division. Ryan took on the task of explaining the advisory opinions that the Attorney General's office is authorized to issue. Who can ask for them? What impact do they have? Are they binding? He tells us how those opinions get written, which is useful information. If you are confronted with an Attorney General's opinion in one of your cases, or if you are involved in some legal matter in which someone wants one, this article will arm you with what you need to know. I found this to be interesting reading, and I bet you do, too. See "A Reintroduction to the Alabama Attorney General's Opinions Division" (page 205).

Enjoy the articles. Email me at wguard@mindspring.com if you have questions or comments. And remember, we are always on the lookout for our next group of excellent writers.

And just wait until you see what we have planned for you in the next issue. ▲



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IMPORTANT NOTICES

- ▲ **Notice of and Opportunity for Comment on Amendments to The Rules of the United States Court of Appeals for the Eleventh Circuit**
- ▲ **Regulatory Correspondence by Email Only and New Enhanced Member Dashboard/Portal Starting September 1**
- ▲ **Harold Albritton Pro Bono Leadership Award**

Notice of and Opportunity for Comment on Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from Wednesday, August 2, 2023, to Friday, September 1, 2023.

A copy of the proposed amendments may be obtained on and after Wednesday, August 2, 2023, from <http://www.ca11.uscourts.gov/rules/proposed-revisions>. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta 30303 (phone 404-335-6100).

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address or at <http://www.ca11.uscourts.gov/rules/proposed-revisions> no later than Friday, September 1, 2023.

Regulatory Correspondence by Email Only and New Enhanced Member Dashboard/Portal Starting September 1

The Alabama State Bar is going paperless! Starting September 1, 2023, we will no longer be sending out regulatory correspondence by mail, including MCLE compliance and dues payments. This does not affect certain mailed communications sent by the Office of General Counsel, as certified mail is sometimes required for disciplinary matters.

Most other correspondence will now only be distributed to you via email. To ensure you receive regulatory communications that could impact your member status, please make sure the email address on your member dashboard is up to date and is

also an email address you regularly monitor and will have access to if your employment or contact information changes.

This initiative will allow the Alabama State Bar to be better and more efficient stewards of our time and resources, eliminating the cost of postage for these notices while also allowing us to reduce our carbon footprint.

If you have questions or trouble logging onto your member dashboard, email ms@alabar.org or call (334) 269-1515, ext. 2144.

We will also be upgrading your member dashboard into an enhanced member portal. Stay tuned for more details and training sessions coming soon!

Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented in October, which is officially designated Pro Bono Month.

To nominate an individual for this award, submit no more than two single-spaced pages that provide specific, concrete examples of the nominee's performance of as many of the following criteria as apply:

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2. Contributed significant work toward developing innovative approaches to delivery of volunteer legal services;
3. Participated in an activity that resulted in satisfying previously unmet needs or in extending services to underserved segments of the population; or
4. Successfully achieved legislation or rule changes that contributed substantially to legal services to persons of limited means or low-income communities.

To the extent appropriate, include in the award criteria narrative a description of any bar activities applicable to the above criteria.

Nominations must be submitted by August 1. For more information about the nomination process, contact Linda Lund at (334) 269-1515, ext. 2246, or linda.lund@alabar.org. ▲



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A Prosecutor's Tool in Child and Protected Person Victim Cases

By William A. Lisenby, Jr.

When a prosecutor receives a case file from a law enforcement agency,

he knows that for a successful prosecution he must be able to prove the elements of his case with witness or documentary evidence.

Because most crimes against a *child* or a *protected person* – both terms are defined in Ala. Code § 15-25-1 (1975) – are not committed in front of someone else, most of the evidence has to come from the victim. Therefore, a prosecutor needs to use every tool he has to get the child's or protected person's story before a jury in the most convincing way possible.

One such tool is the statute that allows the use of an out-of-court statement.¹

And to use it effectively, it is important to know and understand both the 2016 and the 2022 amendments to that statute.

Section 15-25-31

Ala. Code § 15-25-31 (1975) provides: “[a]n out-of-court statement made by a child under 12 years of age at the time the statement is made, or by a protected person as defined in Section 15-25-1,

concerning an act that is a material element of any crime involving a physical offense, sexual offense, or violent offense, as defined in Section 15-25-39, which statement is not otherwise admissible in evidence, is admissible in evidence in criminal proceedings, if the requirements of Section 15-25-32 are met.”²² This statute authorizes the admission into evidence in a criminal trial of what would otherwise be inadmissible hearsay from a child under 12 years of age or a protected person.

There are three important points in this statute.

First, the child witness must have been “under 12 years of age at the time the statement is made.” When the statute first authorized the admission of a child’s out-of-court statement, the child had to be under the age of 12 at the time of the proceeding.

The statute was amended in 2016 to allow the out-of-court statement of a child to be under the age of 12 “at the time the statement is made.”²³ This is a significant change because it may take several years before a case actually goes to trial. Under this amendment, the statement is, in effect, locked in place at the time it is made regardless of when the case proceeds to trial.

Second, the out-of-court statement by the child under 12 or a protected person must “concern [] an act that is a material element of any crime involving a physical offense, sexual offense, or violent offense as defined in Section 15-25-39.” The 2022 amendment significantly increased the kinds of criminal offenses to which this exception applies. Prior to the amendment, § 15-25-39 limited the kind of case such an out-of-court statement was admissible to certain named offenses involving “a child physical offense, sexual offense, and exploitation[,] or violent offense.”

Section 15-25-39 now provides:

“For purposes of this article, ‘a physical offense, sexual offense, or violent offense’ is defined to include the following crimes, when one or more of the victims is a child under 12 years of age or is a protected person as provided in Section 15-25-1:

- (1) A sex offense pursuant to Section 15-20A-5.
- (2) A violent offense pursuant to Section 12-25-32.
- (3) Aggravated child abuse as provided in Section 26-15-3.1.
- (4) Assault in any degree.
- (5) Any offense involving domestic violence, elder abuse, or a violation of a protection order.
- (6) Any attempt to commit any of the offenses listed in subdivisions (1) to (5), inclusive.”

This expansion of criminal offenses will allow prosecutors to pursue more cases where there is a hesitant child witness or protected person or when the person has difficulty in communicating.

Section 15-25-32

The third important point is that the requirements of Section 15-25-32 must be met before the out-of-court statement is admissible. This is probably the most significant change brought about by the 2022 amendment. Prior to the amendment, § 15-25-32 read as follows:

“An out-of-court statement may be admitted as provided in Section 15-25-31,

“(1) The child testifies at the proceeding, testifies by means of video tape deposition as provided by Section 15-25-2, or testifies by means of closed circuit television as is provided in Section 15-25-3, and at the time of such testimony is subject to cross-examination about the out-of-court statements.

(2) a. The child is found by the court to be unavailable to testify on any of these grounds:

1. The child’s death;
 2. The court finds that there are reasonable grounds to believe that the defendant or someone acting on behalf of the defendant has intentionally removed the child from the jurisdiction of the court;
 3. The child’s total failure of memory;
 4. The child’s physical or mental disability;
 5. The child’s incompetency, including the child’s inability to communicate about the offense because of fear or a similar reason; or,
 6. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of closed-circuit television; and,
- b. The child’s out-of-court statement is shown to the reasonable satisfaction of the court to possess particularized guarantees of trustworthiness.”

In *Ex parte B. B. S.*, the Alabama Supreme Court interpreted this statute to require proof of trustworthiness

of the out-of-court statement regardless of whether the child testified or not: “In the Act [*Ala. Acts 1989, No. 89-876*], the ‘trustworthiness’ requirement appears to apply to a hearsay statement, whether the child is available to testify or not....”⁴ The court went on to hold: “Although the question is not without difficulty, we think the Confrontation Clause, *U.S. Const. amend. VI*, requires that hearsay testimony should not be admitted without indicia of reliability, even if the declarant testifies.” *Id.* at 714.

The *B. B. S.* opinion pre-dated the United States Supreme Court opinion in *Crawford vs. Washington*⁵ which held that the Confrontation Clause should be applied to testimonial statements without regard to whether they possessed particularized guarantees of trustworthiness. (“Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts*[⁶] conditions the admissibility of all hearsay evidence on whether it falls under a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’ 448 U.S., at 66, 100 S. Ct. 2531. This test departs from the historical principles identified above in two respects....”)⁷ But, the court went on to say that:

“Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U. S. 149, 162, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). It is therefore irrelevant that the reliability of some out-of-court statements “cannot be replicated, even if the declarant testifies to the same matters in court.” *Post*, at 1377 (quoting *United States v. Inadi*, 475 U. S. 387, 395, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986)). The clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U. S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)).⁸

It eliminates the various reasons a child may be unavailable and only requires “particularized guarantees of trustworthiness” in instances when a witness is unavailable due to actions by a defendant or someone acting on his behalf.

Today, § 15-25-32 provides:

“An out-of-court statement may be admitted as provided in Section 15-25-31, *if either of the following occur*:

- (1) The witness testifies at the proceeding, testifies by means of video deposition as provided by Section 15-25-2, or testifies by means of closed circuit television as is provided in Section 15-25-3, and at the time of the testimony is subject to cross-examination about the out-of-court statements.
- (2) The court finds that the witness’s out-of-court statement is shown to the reasonable satisfaction of the court to possess particularized guarantees of trustworthiness and there are reasonable grounds to believe that the defendant or someone acting on behalf of the defendant has intentionally removed the witness from the jurisdiction of the court or that the defendant engaged in wrongdoing that was intended to, and did, procure the unavailability of the witness.” (Emphasis added.)

Subsection (1), with only a few minor word changes, is substantially similar to its predecessor, i.e., if the witness testifies and is subject to cross examination, then the out-of-court statement is admissible. And because the witness is testifying and subject to cross examination, there does not appear to be any Confrontation Clause issues.⁹ However, subsection (2) is almost completely rewritten. It eliminates the various reasons a child may be unavailable and only requires “particularized guarantees of trustworthiness” in instances when a witness is unavailable due to actions by a defendant or someone acting on his behalf.

The Mechanics of Admissibility

There are four other statutes that require compliance for the admissibility of the out-of-court statement.

Section 15-25-35 requires that the “proponent of the statement must inform the adverse party of the opponent’s intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.” A failure to give the proper notice or to give it in a timely fashion may prevent the admission of highly relevant testimony.¹⁰

Section 15-25-34 requires that “[b]efore a statement may be admitted pursuant to this article on the grounds that the declarant is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the act.” Corroborative evidence is only needed if the witness is unavailable.¹¹

Section 15-25-36, requires that “[t]he court shall inform the jury that the out-of-court statement was taken without the defendant being afforded cross examination of the out-of-court statement.” A failure to have the court give this instruction could be fatal on appeal.¹²

And § 15-25-38 requires that “[t]he court shall support with findings and record any rulings pertaining to the witness’s unavailability and the trustworthiness of the out-of-court statement.” Although this does not have to be done immediately by the trial court when a ruling is made on the admissibility of the statements, the court does need to support its findings of unavailability and trustworthiness.¹³

Conclusion

There are certain requirements that must be met by the prosecutor, and sometimes the trial court, before an out-of-court statement may be admitted under § 15-25-31. However, once those requirements are met, the admission of a witness’s out-of-court statement regarding sensitive issues involved in child sexual offenses, domestic violence cases, and elder abuse cases is a powerful tool in the prosecution of a defendant.

Because of the nature of the amendments to this statute in 2022, the legislature has provided a way for criminal prosecutions to move forward even if the witness is reluctant to testify, unable to communicate effectively, or when the defendant has engaged in wrongdoing to keep a witness from testifying. ▲

Endnotes

1. Although this article specifically addresses the use of child or protected person out-of-court statements in a criminal prosecution if all the requirements are met, such statements may be used in other proceedings. *See, e.g., Smallwood v. State Dep’t of Hum. Res.*, 716 So.2d 684, 685 (Ala. Civ. App. 1998) (although it held that the out-of-court statement

was impermissibly admitted, the court did discuss the application of the statute and rules promulgated by the department of human resources in “a combined child abuse/prerevocation of license hearing . . .”); *State Dep’t of Hum. Res. v. Gibert*, 681 So.2d 560, 561 (Ala. Civ. App. 1995), *writ denied sub nom. Ex parte Gibert*, 681 So.2d 564 (Ala. 1996) (“These appeals are from two judgments of the circuit court, one setting aside the decision of an administrative hearing officer that placed an alleged child molester on the statewide central registry for reports of child abuse and neglect, and another setting aside the decision of an administrative hearing officer that revoked the child care facility license of the alleged molester’s wife.”)

2. The legislature amended this statute in 2022, effective July 1, 2022, to allow the admission of an out-of-court statement from a “protected person as defined in Section 15-25-1” in certain criminal prosecutions.
3. *See, Williams v. State*, No. CR-2022-0543, 2023 WL 1935283, at *9 (Ala. Crim. App. Feb. 10, 2023) (discussing the amendment and holding, per Kellum, J. and two judges concurring in the result, that “[t]he change to § 15-25-31, Ala. Code 1975, was procedural in nature and not a substantive change in the law.”)
4. *Ex parte B. B. S.*, 647 So.2d 709 (Ala. 1994).
5. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
6. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).
7. *Crawford*, 541 U.S. at 60.
8. *Crawford*, 541 U.S. at 59, fn. 9.
9. *Crawford, supra*; *See also, D. L. R. v. State*, 188 So.3d 720, 726-27 (Ala. Crim. App. 2015) (“K. R. personally appeared in court and was subjected to direct questions from defense counsel. No limits or restrictions were placed on defense counsel’s ability to question K. R. as to her out-of-court statements. Although K. R.’s answers to defense counsel’s questions might have been unsatisfactory to him, K. R. did not refuse to answer his questions. The fact that K. R. testified that she could not remember her out-of-court statements does not mean that defense counsel did not have the opportunity to cross-examine her or that she was not subject to cross-examination.” Therefore, the trial court did not violate the Confrontation Clause of the Sixth Amendment or § 15-25-32(1), Ala. Code 1975, by allowing K. R.’s out-of-court statements into evidence.”)
10. *See, e.g., Richerson v. State*, 668 So.2d 130, 136 (Ala. Crim. App. 1995) (“The trial court ruled that any statements offered by the prosecution that were not presented at the original hearing and which the appellant had not been given notice as required by § 15-25-35 were subject to exclusion upon the appellant’s objection.”)
11. *See, Steele v. State*, 911 So.2d 21, 27 (Ala. Crim. App. 2004) (“Likewise, because the child was not unavailable to testify, the State was not required to introduce corroborative evidence.”)
12. *See, e.g., Ex parte R. D. W.*, 773 So.2d 426, 429-30 (Ala. 2000) (“The mandatory language of the statute makes it clear that the Legislature has determined that this information is necessary to a defendant’s defense in a child-sexual-abuse case.”)
13. *See, Ex parte C. L. Y.*, 928 So.2d 1069, 1072 (Ala. 2005) (“We agree with the reasoning of the Court of Criminal Appeals in *K. D. H.* and *Smith*, and we hold that in reviewing the admissibility of out-of-court hearsay statements made by a child victim of sexual abuse, an appellate court may look at the record in its entirety, rather than only the record as it existed at the time of the pretrial ruling on the admissibility of the statements.”)

William A. Lisenby, Jr.



Bill Lisenby is a 35-year career prosecutor. He is a graduate of the University of Alabama School of Law. He is a part-time assistant district attorney for the 39th judicial circuit in Limestone County. He previously served in Alabama’s fifth judicial circuit and Georgia’s Chattahoochee Judicial Circuit District Attorney’s offices and in Alabama’s Attorney General’s Office.



HARD TIME —

A Return to Mandatory Minimums

By Ben M. Baxley

There is a new law that prosecutors and practitioners need to be aware of.

On April 6, 2023, Governor Ivey signed into law Act 2023-004 which provides for a minimum mandatory term of imprisonment for those convicted of trafficking in fentanyl. Before delving into the specifics of this new law, some history of mandatory minimums for drug trafficking might be helpful.

For decades, Alabama prosecutors had mandatory minimums as a useful tool under Alabama's drug trafficking statute. From the view of a prosecutor, mandatory minimums are important when the

evidence is compelling, such as when there are videos, confessions, or fingerprints. Weaker evidence, however, can force a case to trial that should otherwise be settled on a term of probation. Short of reducing a charge, a practice disfavored in some circuits, a trial is sometimes the only viable alternative when mandatory minimums are at play.

The drug trafficking statute, Ala. Code §13A-12-231 (1975), establishes the various mandatory minimums for drug trafficking crimes. Section 13A-12-232 (a) makes clear that sentences under the drug trafficking statute are to be served in prison:

Notwithstanding the provisions of Chapter 22, Title 15, or any other provision of law, with respect to *any person who is found to have violated Section 13A-12-231*, adjudication of guilt or imposition of *sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for any type of parole, probation, work release, supervised intensive restitution program, release because of deduction from sentence for good behavior under corrections incentive time act or any other program, furlough, pass, leave, or any other type of early, conditional, or temporary release program, nor shall such person be permitted to leave the penitentiary for any reason whatsoever except for necessary court appearances and for necessary medical treatment*, prior to serving the mandatory minimum term of imprisonment prescribed in this article or 15 years, whichever is less. Nothing contained in this section shall be construed in any way to render any inmate eligible for parole, probation, suspended sentence, furlough, pass, leave, or any type or early, conditional, or temporary release program of any type to which the inmate is not otherwise eligible under other provision of law. Nor shall anything in this section be construed to render any person sentenced to life imprisonment without parole under this or any other act eligible for parole, probation, suspended sentence, furlough, pass, leave, or any type of early, conditional, or temporary release program at any time.

§ 13A-12-232 (2018) (emphasis added); see, *Ball v. State*, 592 So. 2d 1071, 1075 (Ala. Crim. App. 1991) (“The “mandatory minimum sentences” provided in § 13A-12-231 are the sentences that a person convicted of trafficking in a controlled substance must serve in prison.”)

The sentences required to be served under the drug trafficking statute vary depending on the type and the amount of illegal drug possessed. For instance, possessing more than 2.2 pounds of marijuana requires a sentence of three calendar years. § 13A-12-232 (2018). The more drugs possessed, the longer the mandatory sentence, anywhere from three years for more than 28

The sentences required to be served under the drug trafficking statute vary depending on the type and the amount of illegal drug possessed.

grams of cocaine, to 10 years for more than 28 grams of morphine, to life without parole for more than 56 grams of LSD. *Id.* Although the Alabama Court of Criminal Appeals eventually declared life without parole for a trafficking first offender unconstitutional, the remaining mandatory minimums remained in place.

Wilson v. State, 830 So. 2d 765, 781 (Ala. Crim. App. 2001). Despite the apparently clear language of the drug trafficking statute, however, a series of events beginning in 2000 effectively eviscerated the drug trafficking statute mandatory minimums.

In the early 1990s, the Drug War was in full swing. Prisons were filling up, drug task forces were fully funded, arrest numbers were booming, and dockets were drowning in drug cases. In addition to enforcement efforts, there were also initiatives to combat the drug epidemic on the demand side by requiring drug treatment as a component of rehabilitation within the criminal justice system. The Mandatory Drug Treatment Act of 1990 was

one of the first statutory efforts. §§ 12-23-1, *et seq.* That act allowed for drug offenders to apply for permission to go to drug treatment “in lieu of undergoing prosecution,” i.e., pretrial diversion. §12-23-5. Those efforts eventually opened the doors for drug courts, community corrections, and alternative sentencing.

Alternative sentencing, however, really came into its own because of provisions of the Alabama Split Sentence Act and its various amendments. By 2000, the act authorized judges to split a sentence of not more than 15 years to serve up to three years in a “prison, jail-type institution, or treatment institution . . .” §15-18-8(a)(2). Additional provisions of the statute allowed judges to split a sentence of up to 20 years to similar institutions for a period of not more than five years. *Id.*

Questions arose, however, over the effect of the 2000 amendments to the split sentence act in the context of drug trafficking. Specifically, could the mandatory minimum portion of a sentence imposed on a drug trafficker under section 13A-12-231 of the code be split under the provisions of the Split Sentence Act? In other words, were the mandatories mandatory?

The Alabama Attorney General has a statutory duty to issue written opinions to certain officers and agencies within the state, § 36-15-1((1), and in 2001 the district attorney for Jefferson County asked the question, “[D]oes a court have the authority to ‘split’ those mandatory minimum requirements of what we commonly refer to as our ‘trafficking statute?’” Opinion to Honorable David Barber, District Attorney’s Office, dated Apr. 1, 2002, A.G. No. 2002-196.

Attorney General Bill Pryor responded with an attorney general’s opinion that because of amendments to the Split Sentence Act, a trial judge could probate an entire sentence of less than 20 years even if a portion of the sentence included the mandatory minimum sentences contemplated by the drug trafficking statute. *Id.* at 6.

The reasoning of the *Barber* opinion is sound, albeit complicated, and it can be divided into essentially two points.

First, because the Split Sentence Act contains the phrase “notwithstanding any provision of law to the contrary,” it supersedes any previously enacted conflicting law. *Id.*

Secondly, because the Split Sentence Act was enacted more recently, it is the most recent legislative expression of intent. *Id.* See, *Baldwin County v. Jenkins*, 494 So. 2d 584, 588 (Ala. 1986) (In cases of conflicting statutes on the same subject, the latest expression of the legislature is the law.)

In the end, this reasoning was consistent with the rationale and result reached in a then recent opinion of the Alabama Court of Criminal Appeals dealing with other drug sentencing enhancements. See, *Soles v. State*, 820 So. 2d 163, 165 (Ala. Crim. App. 2001) (enhancements for sale of drugs near schools and public housing projects may be split under the Split Sentence Act.)

Interestingly, neither *Soles* nor the *Barber* opinion addressed an equally compelling statutory interpretation argument. “There is a rule of statutory construction that specific provisions relating to specific subjects are understood as exceptions to general provisions relating to general subjects.” *Pool v. State*, 570 So. 2d 1260, 1262 (Ala. Cr. App.), *aff’d*, 570 So. 2d 1263 (Ala.1990) (quoting *Murphy v. City of Mobile*, 504 So. 2d 243, 244 (Ala.1987)). “Special statutory provisions on specific subjects control general provisions on general statutory provisions on specific subjects.” *Pool*, 570 So. 2d at 1262 (quoting *Baldwin County v. Jenkins*, 494 So. 2d 584, 588 (Ala.1986)).

Had *Soles* considered the specific nature of the drug trafficking statute as it related to the general nature of

the Split Sentence Act, it may have been decided differently. Because of *Soles*, however, the attorney general had little choice but to interpret the Split Sentence Act as it did.

Notably, the Alabama Supreme Court has not specifically determined that a sentence imposed pursuant to the drug trafficking statute can be split or probated under the Split Sentence Act. In 2005, however, our supreme court assumed, without deciding, that such a sentence was proper. See *Ex parte McCormick*, 932 So. 2d 124,140 (Ala. 2005) (amendments to the split sentence act allowed trial court to probate three-year mandatory required by split sentence act.) Instead, *McCormick* exhaustively analyzed the history and amendments to the Split Sentence Act to determine whether a minimum term of imprisonment required by the Split Sentence Act could be probated, in its entirety. *Id.* at 132. The *McCormick* court cited to the *Barber* opinion of the attorney general as persuasive authority for that proposition. *Id.* at 133.

Nonetheless, for the same reasons as those espoused in the *Barber* opinion and *Soles*, the Alabama Legislature has now opened the door for prosecutors to argue for the imposition of mandatory terms of imprisonment for drug traffickers, thus removing judicial discretion as to the mandatory portion of drug trafficking sentences. Act 2023-004 is now the most recent expression of the intent of the legislature. Moreover, at least with respect to repeat offenders, the mandated sentences are required “[n]otwithstanding any provision of law . . .” Ala. Act 2023-004, sec. (13)b.1.

In sum, the legislature has equipped prosecutors with a tool to combat the threat of fentanyl trafficking. The historical interpretation of the drug trafficking statute opens the door for compelling arguments that all minimum mandatory sentences contemplated by sections 13A-12-231 and 13A-12-232 are required in all sentencing orders. In any case, Act 2023-004, effective July 1, 2023, should put fentanyl traffickers on notice that they are facing minimum mandatory sentences of hard time. ▲

Ben M. Baxley

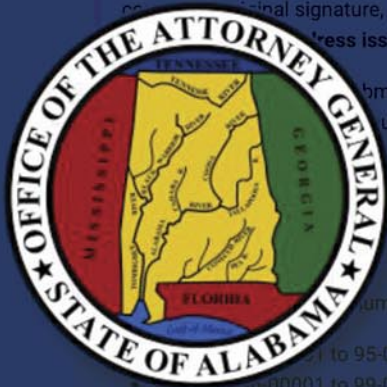


Ben Baxley serves as the chief of the opinions division of the Alabama Attorney General. He is a former assistant district attorney, chief deputy district attorney, and assistant United States Attorney.

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A Reintroduction to the Alabama Attorney General's Opinions Division

By Ryan W. Shaw

Readers of *The Alabama Lawyer* were last introduced to the Alabama Attorney General's Opinions Division 22 years ago.

William H. Pryor, Jr., *A Report from the State's Law Firm*, 62 Ala. Law 264 (2001). This article will reintroduce you to the Opinions Division with a comprehensive look at every stage from opinion request to published opinion. But first, a quick review of the attorney general's authority to issue opinions.

The attorney general is required by law to provide advisory opinions upon request to state and local public officials and public entities on issues related to any question of law that the official or entity has an immediate duty to perform.¹ Ala. Code § 36-15-1(1)a-b (2013).

The legal opinions of the attorney general are advisory and not binding; however, a requestor's compliance with an opinion provides protection from liability to state, county, or other municipal divisions and is persuasive authority

for courts. § 36-15-19 (2013); *Poe v. Grove Hill Mem'l Hosp. Bd.*, 441 So. 2d 861, 863 (Ala. 1983) (“[O]pinions of the Attorney General are not binding on this Court...”). The attorney general is prohibited from answering questions that are “moot, private, or personal questions . . . or questions that are subject to ongoing litigation.” § 36-15-1(1)d (2013). In addition, the attorney general is not authorized to provide opinions to private citizens.

State officials who may request an opinion include the “Governor, Secretary of State, Auditor, Treasurer,

Superintendent of Education, Commissioner of Agriculture and Industries, Director of Finance, Comptroller, State Health Officer, Public Service Commissioners, Commissioner of Conservation and Natural Resources, . . . the Commissioner of Revenue,” other eligible officers or departments of state, and “the Chairman of the Judiciary Committee of either house.” *Id.* at (1)a. In addition, upon request, the attorney general shall issue opinions to the “Judge of probate, clerk of the circuit court, sheriff, city and county boards of education, county commission, register of the circuit court, tax collector, tax assessor, mayor or chief executive officer of any incorporated municipality, city council or like governing body of any incorporated municipality,” plus any officer “required to collect, disburse, handle, or account for public funds.” *Id.* at (1)b.²

Given the diversity of public officials eligible to request an attorney general’s opinion, it follows that the opinion topics covered are just as diverse. Questions addressed include issues requiring an analysis of the Competitive Bid Law, the Public Works Law, the Open Records Law, ad valorem taxes, election law, use of county or municipal funds, use of law enforcement funds, compliance with firearms laws, and the Alabama Memorial Preservation Act, to name a few.


Opinions issued by the attorney general can have a local or statewide impact. Therefore, as demonstrated below, great care is taken to ensure that all opinions

issued are thoroughly reviewed prior to their publication.

In the Opinions Division there are three full-time attorneys (including the division chief), a part-time contract attorney, and a legal research assistant. The division chief handles daily inquiries, drafts letters notifying requestors if an opinion request was previously answered by another opinion, and assigns opinion requests to the other attorneys. In 2021, the Opinions Division received 87 opinion requests that resulted in 55 published opinions. In 2022, 82 opinion requests were received, resulting in 52 published opinions. The current average turnaround time is 97 days from the date the opinion request is received to publication. What follows is a look at what takes place during those 97 days.

Once an opinion request is received it is evaluated to make certain that it complies with all statutory requirements governing the submission of opinion requests. § 36-15-1(1)(d). If the opinion request is properly submitted, the division chief assigns the request to an attorney within the division, a contract attorney, or, if the request requires specialized knowledge of a subject matter, to another assistant attorney general serving in a different department. For example, an opinion request regarding the division of proceeds from gasoline taxes may be assigned to the Alabama Department of Revenue for a response.

Attorneys are typically given two weeks to research and draft a response to an opinion request.



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Once submitted, the opinion request is reviewed by the division chief, who will either return the draft with comments or begin circulating the draft to a committee comprised of a representative of each division within the attorney general's office.

Occasionally, additional attorneys with specialized knowledge of the issue presented or representatives of those organizations directly impacted by the opinion are added to the initial committee to provide comments. Committee members will either concur or dissent with comments. If the initial committee has comments, the opinion request is returned to the drafting attorney for a response. A response by the drafting attorney may require discussion with the dissenter, no action, small edits, or a total rewrite. If the opinion draft clears the first committee, it is then sent to the executive committee.

The executive committee is made up of members from the attorney general's executive division. The executive committee will either concur in the draft opinion or dissent with comments. Again, if a dissent occurs, the draft opinion is returned to the drafting attorney for response, and the comments may cause the document to be edited or rewritten.

If the draft opinion clears the executive committee, it is then sent to the attorney general for his review. As with the initial committee and the executive committee, the attorney general will either concur with the result or dissent with comments. If the draft opinion is approved, it is then prepared for publication.

Typically, a copy of the opinion is sent to the requester two weeks prior to publication. The opinion is then assigned a number and published to the attorney general's

If a published opinion is later modified or overturned by a new law, court case, or a new opinion, a box is appended to the upper right-hand corner of the opinion noting that it is modified or overruled, or a note may be added providing the reader with necessary context before relying on the opinion.

website in compliance with state law. § 36-15-1(3).

If a published opinion is later modified or overturned by a new law, court case, or a new opinion, a box is appended to the upper right-hand corner of the opinion noting that it is modified or overruled, or a note may be added providing the reader with necessary context before relying on the opinion. As of now, opinions with notes providing status updates are only available on the attorney general's website since legal search

engines do not go back and check for updates once they upload them to their search engines. Caution is urged if relying on an opinion found on a legal search engine, and you should check the current status of the opinion on the attorney general's website.

Archived opinions on the attorney general's website go back to 1979. Plans include adding older opinions to the attorney general's website. Until then, physical copies of attorney general's opinions published before 1979 are available at the attorney general's office or at the Alabama Department of Archives and History. The attorney general's office will provide copies of opinions issued prior to 1979 at no cost. ▲

Endnotes

1. Forms for submitting an opinion request and searchable archived opinions are available to the public at www.alabamaag.gov/opinions. The opinion request form must be printed, contain an original signature, and a resolution (if required), and be mailed to the Alabama Attorney General's Office.
2. Note that "[a]ny officer or governing body of a municipality or county or officer or governing body of any other elected or appointed body" shall submit a resolution along with their opinion request "setting forth the facts showing the nature and character of the question which makes the advice or opinion sought necessary to the present performance of some official act that the officer or governing body must perform." § 36-15-1(1)(c) (2013).

Ryan W. Shaw



Ryan Shaw is an assistant attorney general and a graduate of the Cumberland School of Law.



MEMORIALS

- ▲ S. Wayne Fuller
- ▲ William Freeman Horsley
- ▲ Janna L. Ifshin
- ▲ H. Floyd Sherrod

S. Wayne Fuller

Wayne Fuller, age 72, of Cullman, passed away on Friday, March 3, 2023.

He is survived by his fiancée, Karen Ploppert; his son, Michael (Jodi) Fuller; his daughters, Katie (Wescoat) Free, Courtney (Jeremy) Zills, and Jaclyn (Brandon) Gardner; his sisters, Shelby (Jim) Knight and Janice (Charles) Cobb; his grandchildren, Morgan and Mason Fuller; Will, Wyatt, and Mabry Free; Nate, Ansley, Silas, and Sawyer Zills; and Madeline, Tucker, and Tyde Willingham; his horse, Smoke; and his German Shepherd, Heidi.

Wayne was preceded in death by his wife of 42 years, Joan Davidson Fuller; his parents, Silas and Nadine Waldrep Fuller; and his beloved rodeo horse, Woodrow.

Wayne was a well-known attorney in Cullman, where he was born. Cullman was home to him and where he raised his family that he loved so dearly. His travels would always take him out West, and he enjoyed trail riding and team roping and reminiscing with his cowboy buddies. And he loved being on his farm, referred to as "Hat Creek," and working the land.

Wayne was a member of Sacred Heart Catholic Church and served as a lector and eucharistic minister. He was a wonderful human being and an outstanding and well-respected lawyer. He was a member of the Cullman County Bar Association for 46 years and received the honor of AV Peer Rating from 1995 through 2023. Wayne was a member of the American Bar Association, Alabama State Bar, Alabama Association for Justice, American Association for Justice, and Alabama Trial Lawyers Association, of which he served on the board of governors from 1980-1983 and 1985-1987. He served and retired as a captain from the United States Army Reserve.

Wayne will be truly missed by everyone who knew him and worked alongside him.



Fuller

William Freeman Horsley

Bill Horsley died April 27, 2023, at the age of 83 after a short illness. He was survived by his wife, Marilyn, and three children, Stewart, Ellen, and Richard. Bill was raised in Opelika. He received his undergraduate and law degrees from the University of Alabama. While in law school, Bill was a member of Phi Delta Phi, Farrah Order of Jurisprudence, and the board of editors of the *Alabama Law Review*.



Horsley

Bill was a legal scholar and loved the practice of law. He was a pillar of the Lee County Bar. He was arguably one of the best trial lawyers in the state of Alabama. He always said that you won or lost a case before you ever set foot in the courthouse and he was always thoroughly prepared for a trial. He was gifted at legal research. Professionally, as well as in life, he handled himself with the highest integrity and ethics and his word was his bond.

One of the highlights of his career was a landmark divorce case, the only divorce case he ever handled, that he argued before the United States Supreme Court, which case changed the constitutionality of the Alabama divorce laws.

Bill practiced law for 56 years at the firm of Samford & Denson LLP. Bill was a role model, mentor, and friend to all of the partners and associates of his firm. He will be greatly missed by his family, and he will also be greatly missed by the members of his firm, the members of the bar, and by all of his friends.

Janna L. Ifshin

Janna Ifshin passed away April 14, 2023. She grew up in Huntsville, received a Bachelor of Arts in communication in 1988, and a J.D. in 1992, both from the University of Alabama. Janna was admitted to the Alabama and Tennessee bars in 1992. She later became a member of the Florida bar. She first started her legal career with the district attorney's office in Tuscaloosa. Janna then went to work as a law clerk to



Ifshin

Judge Lloyd H. Little, Jr. and to Judge Thomas N. Younger of the Madison County Circuit Court. In September 1995 she joined the Huntsville office of Bond & Botes, starting her career in debtor-creditor law. In 1998 she moved to Florence to manage the Bond & Botes's Florence office. Six months later she moved to Florida where she managed the firm's Pensacola office for five years. After a break from the practice, she resumed representing debtors at the Birmingham firm Jaffe & Erdberg PC in 2009. A little over three years later, she began working at Sirote & Permutt PC representing creditors. In 2016, she was appointed Career Clerk for the Hon. D. Sims Crawford, U.S. Bankruptcy Court for the Northern District of Alabama. She served in that capacity until March 2020.

Janna was passionate about sports and was particularly opinionated about her love of Alabama football and basketball. She enjoyed machine embroidery, cooking, was an avid reader, enjoyed working puzzles and strolling on the beach. Janna was an enthusiastic traveler, particularly cruises and more particularly family cruises. Janna was devoted to her family and prized her role as aunt to her niece and nephews, doting on them and her Dachshunds.

(Continued from page 209)

H. Floyd Sherrod

Floyd Sherrod, loving husband, father, lawyer, advocate for the less fortunate, passionate Democrat, avid birder, kind listener, voracious reader, and deep thinker, passed away on Monday, April 10, 2023, at the age of 86, having done his part to make the world a little better place.

Floyd had four sons from his first marriage: Hank, Chris, John, and Richard. In 1986, he found his true love and life partner in marrying Elizabeth (Libba) Barnwell, and lovingly accepted her daughter, Laura, as his fifth child. Floyd loved each one and was always willing to provide a kind ear and wise counsel.

Floyd was predeceased by his parents, Floyd and Effie Poole Sherrod, and by his sister and brother-in-law, Sherry and Pat Sandlin. Floyd is survived by his wife, Libba; his five children, Hank (Robyn), Chris, John (Melinda), Richard, and Laura (Josh Wilkinson); eight grandchildren, Josh, Colly, Luci, Jackson, Jessica, John, Roman (Alicia), and Addie; three great-grandchildren, Darby, Brynleigh, and another due in May; niece Scott Sandlin; and nephew Patrick Sandlin.

Born to educator parents, Floyd's father was the principal, and his mother was a math teacher at the school in Woodville, Alabama. Floyd stood out from the crowd at an early age. At age 14, he was an Eagle Scout with 27 merit badges and, at age 15, he was appointed to be a page at the Democratic National Convention in Chicago by Alabama Senators John Sparkman and Lister Hill and Congressman Bob Jones.

Floyd was a gifted thinker and scholar. He was valedictorian of his Decatur High School class of 1954 and was elected to Phi Beta Kappa in his junior year at Sewanee. He received a master's from Tufts University and was among the top graduates in law school at the University of Alabama.

After completing his legal education in 1961, Floyd followed his passion to the District of Columbia, where he worked as a lawyer in the Department of Justice, as the legislative assistant



Sherrod

to Senator Sparkman, and as a special assistant to the Secretary of Labor in the Lyndon B. Johnson administration. The 1968 election sent Floyd from D.C. to Athens, Georgia, where he taught at the University of Georgia School of Law, published in the *Georgia Law Review* on environmental law, and edited the *Environmental Law Review*, where he selected, organized, and introduced the best articles each year.

Floyd returned to Alabama in 1973, first in private practice in Decatur, and then, in 1978, in Florence, where he would find his life's work as the managing attorney of the Florence office of Legal Services Corporation of Alabama which provided free legal representation to low-income people. Floyd opened the northwest Alabama office, hired and supervised the staff, and set about making a difference in people's lives. In the early years, Floyd was instrumental in filing class action lawsuits on behalf of eligible groups who were seeking justice: in one, he was appointed to represent inmates in a lawsuit over inhumane conditions at the Lauderdale County Jail (that ultimately led a federal judge to order the county to build a new jail) and in another, filing suit to stop a local restaurant from discriminating against certain employees.

Floyd's work and calling was helping low-income people in much less high-profile ways. He sat with them, listened to them, heard their stories, felt their pain, and tried to help them, without judgment, solve problems regarding their benefits, housing, medical care or whatever the need. For over 26 years, day in, day out, Floyd (along with his staff, who loved him and the mission), gave his clients the gift of his empathetic ear and keen mind. And when he wasn't doing that, he was working in other ways, including advocacy with the state and local bars, to make things better for low-income Alabamians.

His commitment to the less fortunate did not stop when he left the office. Floyd was active in the local food pantry at the Help Center of Florence long past his retirement from Legal Services. Besides serving on the board for a time, many a weekend, often with a grandchild in tow, Floyd would pick up and deliver food donations to the Help Center and was very involved in Meals-on-Wheels. Through his involvement with Florence Kiwanis, he served the community by reading to children at Handy School, ringing the bell for the Salvation Army, and flipping his share of pancakes.

Floyd's state and local involvement extended well beyond the Help Center. He was on birding boards (Alabama Audubon Council, Alabama Ornithological Society), served on the Alabama Rivers Alliance board, supported Alabama Arise, and was an active member of St. Bartholomew's Episcopal Church. Time with friends at the ILR, "Gonce Book Group," and his noon study group enriched his life.

Floyd seriously loved birding. He enjoyed being outdoors observing their behavioral and nesting habits. His hearing

was notoriously deficient, but he did his best, struggling to identify them by their songs. His many travels with Libba over the years usually included a bird-related detour in numerous countries around the world. He shared his interest in birds with those he loved, and, for many of us, time with birds will be time with his spirit.

Floyd will be profoundly missed by his family, friends, and the community. ▲

Stephen Richard Arnold

Birmingham
Died: May 26, 2023
Admitted: 1974

Brian Lee Justiss

Wetumpka
Died: May 16, 2023
Admitted: 2001

Hon. Anne Lamkin Durward

Birmingham
Died: May 27, 2023
Admitted: 1995

Stephen Paul McMunn

Trussville
Died: April 14, 2023
Admitted: 1994

Hon. Warren Levington Hammond, Jr.

Mobile
Died: June 11, 2023
Admitted: 1966

Barry Dale Vaughn

Sylacauga
Died: June 17, 2023
Admitted: 1975

Tonya Gail Johnson

Phoenix
Died: May 11, 2023
Admitted: 1998

Karen Marie Walker

Orlando
Died: December 8, 2022
Admitted: 1993

Richard Marlon Jordan

Montgomery
Died: June 17, 2023
Admitted: 1964

Dr. Walter Cecil Williamson, Jr.

Selma
Died: January 27, 2023
Admitted: 2005



Proposed New Rules Concerning Privacy and Confidentiality of Court Records

INVITATION FOR PUBLIC COMMENT:

By David G. Wirtes, Jr. and Scott Donaldson

Alabama law provides a statutory presumption that court records are public and accessible to all.

See Ala. Code § 36-12-40 (“Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute. ...”). Alabama also recognizes a common-law right of public access to judicial records. *See Holland v. Eads*, 615 So. 2d 1012, 1014 (Ala. 1993) (“it is clear that the courts

of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”). Alabama’s recognition of these rights of public access date back almost 150 years. *See Brewer v. Watson*, 61 Ala. 310, 311 (1878) (“[a]n inspection of the records of judicial proceedings kept in the courts of the country, is held to be the right of any citizen.”). *Holland v. Eads* reiterates “[t]he public’s right to inspect court records derives from the ‘universal policy

underlying the judicial systems of this country [that] secrecy in the exercise of judicial power ... is not tolerable or justifiable.” *Id.* at 1014 quoting *Jackson v. Mobley*, 157 Ala. 408, 411-12, 47 So. 590, 592 (1908).

However, there are many recognized exceptions to the general rights of access. Some are statutory,¹ others are by judicial decision² and still others are by rules of procedure.³

Some court records involve factual scenarios such as personal identification information in medical records and photos showing abuses of minors in domestic disputes which at present have no protections against public access even though they obviously should not be available for public use or misuse.

The Alabama Supreme Court’s Joint Task Force on Privacy and Confidentiality of Court Records

In recognition of the confusion and inconsistency created by Alabama’s hodgepodge of statutes, appellate decisions and rules of procedure, the Chairs of the Supreme Court’s Standing Committees on the Rules of Appellate Procedure (Ed Haden of Balch & Bingham in Birmingham) and the Rules of Civil Procedure (Maibeth Porter of Maynard Cooper Gale in Birmingham) created a Joint Task Force⁴ to study the issue and determine whether Alabama might benefit from a comprehensive set of rules which could bring clarity and consistency to these troubling issues.

Under the leadership of Judge Scott Donaldson,⁵ the Joint Task Force for the past two and one-half years has examined Alabama’s 102 (or so) pertinent statutes spread over 84 sections in 27 titles of our Code, our 35 (or so) reported Alabama appellate opinions and the 20 (or so) rules found within the present Rules of Civil Procedure, Rules of Juvenile Procedure, Rules of Judicial Proceedings and Rules of Appellate Procedure. Members of the Joint Task Force also have studied how each of the other 49 states have addressed privacy and confidentiality. We have also reviewed and considered voluminous materials from secondary sources such as Sedona Conferences and materials compiled by the National Civil Justice Institute, among others. Collectively, after review of literally thousands of pages of rules, opinions and secondary sources, we have created a proposed set of rules of court record privacy and confidentiality which we intend to submit to the Justices of the Alabama Supreme Court for review and consideration with the hope the Court will under the powers vested to it through the judicial article adopt this compilation of rules as Alabama law so that all judges, all lawyers and indeed all citizens will know what the rules are, where to find them, and how to go about determining what is and is not publicly accessible.

Request for Comment

The members of the Joint Task Force hope to present the Supreme Court with as comprehensive, thoughtful and correct a proposed list of rules as possible. Accordingly, we invite each reader to give us suggestions, additions, deletions, edits and comments which we on the Task Force collectively will study and determine what to do with. Please email any such input within the next 21 days to dgw@cunninghambounds.com.

Draft Rules of Court Record Privacy and Confidentiality

ALABAMA RULES OF COURT RECORD PRIVACY AND CONFIDENTIALITY

ARTICLE I. GENERAL PROVISIONS

Rule

- 101. Scope.
- 102. Purpose.
- 103. Definitions.
- 104. General access rule.

ARTICLE II. EXCLUSIONS AND CONFIDENTIAL INFORMATION

Rule

- 201. Court records excluded from public access.
- 202. Confidential information.

ARTICLE III. PROCEDURES

Rule

- 301. Procedure to seal or otherwise restrict public access to records.
- 302. Procedure to petition for access to sealed or otherwise restricted records.
- 303. Procedure to redact information.

ARTICLE IV. FEES

Rule

- 401. Court fees.

ARTICLE I. GENERAL PROVISIONS

Rule 101. Purpose.

This rule applies to all court records in all Alabama Appellate, Circuit, District, Juvenile, Small Claims, Municipal and Probate Courts, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record

Rule 102. Purpose.

The purpose of this rule is to provide a comprehensive policy on access to court records. The rule provides for access in a manner that:

- (1) Maximizes accessibility to court records,
- (2) Supports the role of the judiciary,
- (3) Promotes governmental accountability,
- (4) Contributes to public safety,
- (5) Minimizes risk of injury to individuals,
- (6) Protects individual privacy rights and interests,
- (7) Protects proprietary business information,
- (8) Minimizes reluctance to use the court to resolve disputes,
- (9) Makes most effective use of court and clerk of court staff, and
- (10) Does not unduly burden judicial officials or court personnel.

The rule is intended to provide guidance to 1) litigants, 2) those seeking access to court records, and 3) judges, court and clerk of court personnel responding to requests for access.

Task Force's Notes

The Alabama Rules of Court Record Privacy and Confidentiality honor and reflect settled Alabama law that every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute. See Ala. Code § 36-12-40. These Rules also honor and reflect the Alabama Supreme Court's unanimous holding in *Holland v. Eads*, 614 So.2d 1012 (Ala. 1993), that there also is a common-law right of public access to judicial records, except in limited and specifically enumerated exceptions. Holland's observations, which are precedential and binding, require a careful treading when considering the scope of what is or is not accessible as a public record in Alabama's Courts.

Holland v. Eads states:

"The United States Supreme Court has recognized a common law right of public access to judicial records. *Nixon v. Warner Communications, Inc.*, 435

U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). “ ‘It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.’ ” *United States v. Criden*, 648 F.2d 814, 819 (3d Cir.1981), quoting *Nixon, supra*, 435 U.S. at 597, 98 S.Ct. at 1312. In fact, this right of the public to inspect and copy judicial records antedates the United States Constitution. *Criden, supra*.

It has long been the rule of this State to allow public inspection of judicial records. *Brewer v. Watson*, 61 Ala. 310, 311 (1878). More than a century ago, this Court held that “[a]n inspection of the records of judicial proceedings kept in the courts of the country, is held to be the right of any *1015 citizen.” *Id.* at 311; see also *Ex parte Balogun*, 516 So.2d 606, 612 (Ala.1987) (holding that “the public generally has a right of reasonable inspection of public records required by law to be kept, except where inspection is merely out of curiosity or speculation or where it unduly interferes with the public official’s ability to perform his duties”); *Excise Comm’n of Citronelle v. State ex rel. Skinner*, 179 Ala. 654, 657, 60 So. 812, 813 (1912). The public’s right to inspect court records derives from the “universal policy underlying the judicial systems of this country [that] secrecy in the exercise of judicial power ... is not tolerable or justifiable.” *Jackson v. Mobley*, 157 Ala. 408, 411–12, 47 So. 590, 592 (1908).

In addition to a common law presumption of permitting public inspection of judicial records, which has been recognized by the United States Supreme Court and by this Court, public access to court records is permitted by statute. Ala. Code 1975, § 36–12–40, grants the public the right to inspect and copy “public writings,” which term has been interpreted to include judicial records. *Ex parte Balogun, supra*; *Stone v. Consolidated Publishing Co.*, 404 So.2d 678, 681 (Ala.1981) (interpreting a “public writing” to be “a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens”); *State ex rel. Kernells v. Ezell*, 291 Ala. 440, 442–43, 282 So.2d 266, 268 (1973) (holding that records of the office of the probate judge are “public writings” within the meaning of the predecessor to § 36–12–40

and are “free for examination [by] all persons, whether interested in the same or not”); *Excise Comm’n of Citronelle, supra*; *Brewer, supra*.

Limitations of the public’s right to inspect “must be strictly construed and must be applied only in those cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure.” *Chambers v. Birmingham News Co.*, 552 So.2d 854, 856 (Ala.1989). The party refusing disclosure bears the burden of “proving that the writings or records sought are within an exception and warrant nondisclosure of them.” *Chambers*, at 856–57; *Ex parte CUNA Mutual Ins. Society*, 507 So.2d 1328, 1329 (Ala.1987); *Ex parte McMahan*, 507 So.2d 492, 493 (Ala.1987). This Court has held that the following types of records do not warrant disclosure: “[r]ecorded information received by a public

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ASSOCIATE LICENSED COUNSELOR UNDER THE SUPERVISION
OF CAROL J. WHITE, LPC-S, SUPERVISING COUNSELOR



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officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public.” *Stone*, 404 So.2d at 681.”

Id. at 1014-15.

Holland’s ultimate holding is:

“We have examined the different approaches used in other jurisdictions. In light of the public policy in favor of public access and the prevailing analysis of this presumption in most American courts, we hold that if a motion to seal is filed, then the trial court shall conduct a hearing. The trial court shall not seal court records except upon a written finding that the moving party has proved by clear and convincing evidence that the information contained in the document sought to be sealed:

- (1) constitutes a trade secret or other confidential commercial research or information; see *Brown & Williamson Tobacco Corp.*, *supra*, at 1179; or
- (2) is a matter of national security; see *Barron*, *supra*, at 118; or
- (3) promotes scandal or defamation; or
- (4) pertains to wholly private family matters, such as divorce, child custody, or adoption; see *Warner*, *supra*; *Balogun*, *supra*; *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941); or
- (5) poses a serious threat of harassment, exploitation, physical intrusion, or other particularized harm to the parties to the action; or
- (6) poses the potential for harm to third persons not parties to the litigation.

If any one of the above criteria is satisfied, then the trial court may seal the record, or any part of the record, before trial, during trial, or even after a verdict has been reached.”

Id. at 1016 (underlined emphasis added).

Rule 103. Definitions.

- (A) A court record includes any record authorized to be made by any law of this state belonging or pertaining to any court or any other public record authorized by law or any paper, pleading,

exhibit or other writing filed with, in or by any such court, office or officer.

- (B) Information in a court record in electronic form includes information that exists as:
- (1) electronically stored data, which is the whole or the partial informational content of court records or documents, which content has been electronically recorded separately from the images of these records or documents and stored in an electronic database maintained by the Administrative Office of Courts (“the AOC”);
 - (2) electronic-document images, which are graphic reproductions or likenesses of documents electronically encoded and stored on an AOC database that have the capability to be reconstituted from the electronic datastreams in which they are encoded and displayed electronically or printed on paper;
 - (3) electronic datastreams, which are a series of on-and-off electrical switches or impulses that are used to encode, transmit, and store electronic data and electronic-document images on AOC databases; and
 - (4) electronic databases, which are repositories of the datastreams that comprise the electronic data or images that are stored in computer hard drives or other similar electronic-storage devices maintained by the AOC.
- (C) Public access means that the public may inspect and obtain a copy of the information in a court record unless otherwise prohibited by statute, court rule or a decision by a court of competent jurisdiction. The public may have access to inspect information in a court record upon payment of applicable fees.
- (D) Remote access means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.
- (E) Confidential information is information that is exempt from the public right of access and

may be released only to the persons or organizations designated by law, statute, or court order. As applied to information contained within a court record, the term “exempt” means that such information is confidential. Confidential information includes information that is confidential under this rule or under a court order entered pursuant to this rule. To the extent reasonably practicable, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential.

Rule 104. General access rule.

- (A) Every citizen has a right to inspect and obtain a copy of any court record of this state, except as otherwise expressly provided by law, this rule or court order.
- (B) Records sealed, exempted, or otherwise restricted by law, rule, or court order may not be released to the general public except by court order.

law. Note also that additional documents are listed below that may not be within court records but are related to the court system; the public and court staff should be aware of access rules relating to these documents:

- (1) Records furnished to a committee on a utilization and quality control committee, peer review committee, or professional standards committee pursuant to Ala. Code § 6-5-333 as construed by decisions of the Alabama Supreme Court and Court of Civil Appeals;
- (2) Trade secrets pursuant to Ala. Code §§ 8-27-2, 22-30-18, and 27-22-25 as construed by decisions of the Alabama Supreme Court and Court of Civil Appeals;
- (3) Communications between provider and recipient of professional services of a professional corporation pursuant to Ala. Code § 10A-4-3.04;
- (4) Audio recordings of 911 calls subject to the provisions of Ala. Code § 11-98-12;
- (5) The reports of a probation officer to the court pursuant to Ala. Code § 12-14-13;
- (6) Court notice of child delinquency and any information received by a teacher, counselor, administrator, or other school employee in confidence for the limited purpose of rehabilitating the child and protecting students and staff pursuant to Ala. Code § 12-15-217;
- (7) Law enforcement files concerning a child pursuant to Ala. Code § 12-15-134;
- (8) The names or any list of prospective jurors drawn from the master jury box pursuant to Ala. Code § 12-16-59;
- (9) The names or any list of grand or petit jurors drawn from the trial court jury box pursuant to Ala. Code § 12-16-70;
- (10) Any information pertaining to the grand jury’s deliberations pursuant to Ala. Code §§ 12-16-215 and 12-16-216;
- (11) Hospital records produced in response to *subpoena duces tecum* pursuant to Ala. Code § 12-21-6;

Task Force’s Notes

As to Rule 104(a), see Ala. Code § 36-12-40 (“Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute”).

ARTICLE II. EXCLUSIONS AND CONFIDENTIAL INFORMATION

Rule 201. Court records excluded from public access.

The following information in a court record is not accessible to the public:

- (A) Information that is not to be accessible to the public pursuant to federal law;
- (B) Information that is not to be accessible to the public pursuant to state law, this rule, or court order as follows;
- (C) Examples of such state laws, court rules, or case law follow. Note this may not be a complete listing and the public and court staff are directed to consult state law, this rule, and case

- (12) Information that is confidential or privileged pursuant to Ala. Code §§ 12-21-131(i), 15-23-42, 34-8A-21, and Rule 503 of the Alabama Rules of Evidence;
- (13) Confessions to, and spiritual or marital advice from, clergy pursuant to Ala. Code § 12-21-166;
- (14) Marital communications pursuant to Ala. Code § 12-21-227;
- (15) Treatment records of drug offenders pursuant to Ala. Code § 12-23A-10;
- (16) Parole or probation records subject to privilege pursuant to Ala. Code § 12-26-7;
- (17) Presentence investigation reports pursuant to Ala. Code § 13A-5-47;
- (18) Abuse and neglect files and records pursuant to Ala. Code §§ 15-1-2 and 26-14-8;
- (19) Communications between a non-English-speaking defendant and an appointed interpreter pursuant to Ala. Code § 15-1-3;
- (20) Privileged communications between an indigent defendant and court-appointed counsel pursuant to Ala. Code §§ 15-12-28 and 15-12-44;
- (21) Court notice to the principle of a juvenile sex offender's school and any information contained in such notice pursuant to Ala. Code § 15-20A-27;
- (22) All reports, records, and data assembled by any probation officer and referred to the court pursuant to Ala. Code § 15-22-53;
- (23) All reports, records, and data assembled by any parole officer pursuant to Ala. Code § 15-22-73;
- (24) All records of persons convicted but pardoned for acts in protest of racial segregation or discrimination pursuant to Ala. Code § 15-22-92;
- (25) Investigative reports of law enforcement agencies pursuant to Ala. Code § 15-23-5;
- (26) Any information received by a crime victim from the prosecutor relating to the substance of the case pursuant to Ala. Code § 15-23-65;
- (27) Pre-sentence investigative reports pursuant to Ala. Code § 15-23-73;
- (28) The results of testing of a defendant for sexually transmitted disease pursuant to Ala. Code § 15-23-103;
- (29) Records regarding prescriptions and drug stocks pursuant to Ala. Code § 20-2-91;
- (30) Information in the controlled substance database pursuant to Ala. Code § 20-2-215;
- (31) Information concerning any aspect of a complaint resolution proceeding pursuant to Ala. Code § 22-5A-6;
- (32) Living wills filed in a county probate court pursuant to Ala. Code § 22-8A-14;
- (33) Vital records pursuant to Ala. Code § 22-9A-21;
- (34) Reports concerning sexually transmitted disease from a physician or administrator of certain institutions pursuant to Ala. Code § 22-11A-14;
- (35) Records related to investigation of an infected health care worker pursuant to Ala. Code § 22-11A-69;
- (36) Records concerning the accreditation, quality assurance, and similar materials pursuant to Ala. Code § 22-21-8 as construed by decisions of the Alabama Supreme Court and Court of Civil Appeals;
- (37) Information obtained by the Director of Industrial Relations concerning employment, wages, hours, unemployment, and related matters pursuant to Ala. Code § 25-4-116;
- (38) All documents and information obtained by the State Department of Industrial Relations concerning communications between and among employers, employees, and the department regarding the workers' compensation ombudsman program pursuant to Ala. Code § 25-5-294;

- (39) All papers, pleadings, and other documents pertaining to an adoption pursuant to Ala. Code § 26-10A-31;
- (40) Where the court has entered a final adoption decree, the original birth certificate and evidence of adoption pursuant to Ala. Code § 26-10A-32;
- (41) Information from the putative father registry pursuant to Ala. Code § 26-10C-1;
- (42) Information and records acquired by child death review teams pursuant to Ala. Code § 26-16-98;
- (43) Abortion records and other information involving court proceedings conducted pursuant to Ala. Code § 26-21-4;
- (44) The woman's identity in a Woman's Right to Know Act proceeding pursuant to Ala. Code § 26-23A-11;
- (45) Communications, documents, and other information proffered at a hearing to consider a complaint against a seller of insurance products pursuant to Ala. Code § 27-7-38;
- (46) Criminal history pursuant to Ala. Code §§ 27-9A-17, 27-25-4.4, 27-25-4.6, and 41-9-642;
- (47) Certain filings of captive insurers pursuant to Ala. Code § 27-31B-3;
- (48) The address of the child or the victim of family or domestic violence pursuant to Ala. Code § 30-3-135;
- (49) Identifying information of persons at risk from the effects of domestic violence or abuse pursuant to Ala. Code § 30-3-167;
- (50) The location of an at-risk party or child in a child custody proceeding pursuant to Ala. Code § 30-3B-209;
- (51) The address of an at-risk child or victim in a parentage proceeding pursuant to Ala. Code § 30-3D-312;
- (52) Domestic abuse victim's home address, business address (if applicable), home telephone number, business telephone number (if applicable), the home or business address or telephone number of any member of the victim's household, and any address that may reveal the confidential location of a shelter for victims of domestic violence pursuant to Ala. Code § 30-5-5;
- (53) Records of domestic violence fatality review pursuant to Ala. Code § 30-9-2;
- (54) Records relating to a conviction or adjudication in a DUI case for an under-21 individual pursuant to Ala. Code § 32-5A-191(b);
- (55) Reports or records received or made by the State Department of Public Safety or State Driver License Medical Advisory Board regarding whether a person meets the medical, physical, or mental standards to be licensed as a driver pursuant to Ala. Code § 32-6-43;



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- (56) Information regarding motor vehicle registration suspension or reinstatement status pursuant to Ala. Code § 32-7A-24;
- (57) Marine police records relating to confidential reports and accident reports pursuant to Ala. Code § 33-5-7;
- (58) Information submitted during mediation in a dispute between Alabama and Georgia pursuant to Ala. Code § 33-18-1;
- (59) Information submitted during mediation in a dispute between any two or more of the three states (Alabama, Florida, and Georgia) pursuant to Ala. Code § 33-19-1;
- (60) Any records, information, or writings obtained or kept by the State Board of Public Accountancy in connection with a peer review program or a disciplinary investigation pursuant to Ala. Code § 34-1-3;
- (61) Attorney-client confidences pursuant to Ala. Code § 34-3-20;
- (62) Records of hearings involving the suspension or revocation of medical licenses pursuant to Ala. Code § 34-24-361.1;
- (63) Registration, circulation records and information concerning the use of the public, public school or college and university libraries, per Ala. Code § 36-12-40;
- (64) DNA records collected to identify criminal suspects or offenders pursuant to Ala. Code § 36-18-27;
- (65) Testimony taken in a fire investigation pursuant to Ala. Code § 36-19-25;
- (66) Confidential information received from an insurer in a fire investigation pursuant to Ala. Code § 36-19-43;
- (67) Complaints to the State Ethics Commission pursuant to Ala. Code § 36-25-4;
- (68) Information obtained by any Public Service Commission employee through official business pursuant to Ala. Code § 37-1-13;
- (69) Information obtained by any Public Service Commission employee in a motor carrier examination pursuant to Ala. Code § 37-3-25;
- (70) Records of the county department of human resources pertaining to adoptions or children placed in foster homes pursuant to Ala. Code § 38-1-4;
- (71) Reports of criminal history background received by the Department of Human Resources pursuant to Ala. Code § 38-13-8;
- (72) Identifying information of taxpayers in revenue rulings pursuant to Ala. Code § 40-2A-5;
- (73) Information in a drug and controlled substance excise tax return pursuant to Ala. Code § 40-17A-13;
- (74) Working papers used in the preparation of reports of audit findings pursuant to Ala. Code § 41-5A-19;
- (75) Record of private hearings or sealed proceedings pursuant to Ala. Code § 41-22-12;
- (76) Appellate mediation records pursuant to Rule 8 of Alabama Rules of Appellate Mediation;
- (77) Privileged material prepared in anticipation of litigation by a party's attorney or representative pursuant to Rule 26 of the Alabama Rules of Civil Procedure;
- (78) Depositions which have been sealed by an officer and filed with the court pursuant to Rule 30 of the Alabama Rules of Civil Procedure;
- (79) Custody or visitation dispute mediation proceedings pursuant to Alabama Civil Court Mediation Rule 11;
- (80) Unexecuted search warrants, which have been sealed for confidentiality, pursuant to Rule 3.14 of the Alabama Rules of Criminal Procedure;
- (81) Attorney discipline records pursuant to Rule 30 of the Alabama Rules of Disciplinary Procedure;
- (82) Privileged confidential communications between attorney and client pursuant to Rule 502 of the Alabama Rules of Evidence;
- (83) Judicial disciplinary proceedings pursuant to Alabama Constitution Article VI §

156(b) and Alabama Rules of Procedure of the Judicial Inquiry Commission Rule 5;

- (84) Disciplinary records of city employees until there is a conclusion of the disciplinary proceeding(s);
- (85) Grand jury proceedings;
- (86) Information filed with any court pending in camera review; and
- (87) Any other record declared to be confidential or privileged by statute, rule, or court order.

Task Force's Notes

Rule 201(C)(1) through (87) provide examples of court records which are private or confidential and exempt or privileged from public access. Note this may not be a complete listing and the public and court staff are directed to consult state law, this rule, and case law. Note also that additional documents are listed that may not be within court records but are related to the court system; the public and court staff should be aware of access rules relating to these documents:

Subdivision (C)(12). Client/Patient Privilege. This subdivision references multiple statutes and rules, including Ala. Code § 12-21-131, which discusses confidentiality and privileged information that an interpreter gathers from a deaf person pertaining to any pending proceeding in which that deaf person is a party. Ala. Code § 15-23-42 pertains to the confidentiality of communications between a victim and a victim counselor. Ala. Code § 34-8A-21 concerns privileged communications and confidential relations between licensed professional counselors or certified counselor associates and their clients.

As it relates to Rule 503 of the Alabama Rules of Evidence, Alabama statutory law has long recognized a psychologist-client privilege. Ala. Code 1975, § 34-26-2. This particular statutory privilege was amended in 1979 to include psychiatrists within its coverage. The legislative act creating the privilege stipulates that it is to be placed upon the same basis as the privilege that arises by law between an attorney and a client; consequently, Rule 503 is modeled after the rule providing for the corresponding attorney-client privilege. See *C. Gamble, McElroy's Alabama Evidence* § 414.01 (4th ed. 1991). The language of Rule

503 is taken largely from the Uniform Rules of Evidence. See Unif. R. Evid. 503.

It should be noted that the Alabama Rules of Evidence contain no general physician-patient privilege. Such a privilege has never been recognized in Alabama, either by the legislature or by the courts. See *Duncan v. State*, 473 So.2d 1203 (Ala.Crim.App.1985). See also *C. Gamble, McElroy's Alabama Evidence* § 413.01 (4th ed. 1991); J. Colquitt, *Alabama Law of Evidence* § 5.10 (1990). Communications with a physician may fall within the Rule 503 psychotherapist privilege if the physician is a licensed psychologist or is a practicing psychiatrist. See *Ex Parte Rudder*, 507 So.2d 411 (Ala.1987).

Subdivision (C)(18). Abuse and neglect files. This subdivision references Ala. Code § 26-14-8(c), which states that “reports and records of child abuse and neglect and related information or testimony shall be confidential, and shall not be used or disclosed for any purposes other than . . . (4) For use by a court where it finds that such information is necessary for the determination of an issue before the court; or . . . (8) For use by an attorney or guardian ad litem in representing or defending a child or its parents or guardians in a court proceeding related to abuse or neglect of that child.” Ala. Code § 15-1-2 provides that “court records of a child under the age of 18 years who is a victim of sexual abuse or exploitation shall not be open to the public, but shall be kept in the same manner as juvenile offender records are kept.” For more on abuse and neglect records, see *Ex Parte Esteban*, 2021 WL 3700086 (Ala. 2021).

Subdivision (C)(43). Minor abortion records. This subdivision mirrors the language in Ala. Code § 26-21-8, which declares that “[r]ecords and information involving court proceedings conducted pursuant to Ala. Code § 26-21-4 shall be confidential.”

Subdivision (C)(46). Criminal history. This subdivision references Ala. Code § 41-9-642, which prohibits any person, agency, corporation, or other legal entity that the Alabama Justice Information Commission determines to lack the “need to know” or the “right to know” from disclosing criminal histories or other information that may lead to the identification of an individual to whom such information pertains. The Supreme Court of Alabama confirmed this interpretation of the statute in *Mobile Press Register, Inc. v. Lackey*, 938 So.2d 398 (Ala. 2006). Ala. Code §§

27-9A-17, 27-25-4.4, and 27-25-4.6 apply to applications for insurance licenses, and these sections require that the Commissioner of the Alabama Department of Insurance treat fingerprints and criminal histories gathered during this application process as confidential.

Subdivision (C)(77). Attorney Work-Product. In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), a landmark decision, the Court was confronted with the applicability of the venerated attorney-client privilege to all of the information assembled by the attorney while preparing his case. While refusing to apply the attorney-client privilege to a lawyer's entire files and mental impressions, the court, on the other hand, was unwilling to make discovery proper in all instances. Defining the delicate balance between the equally undesirable extremes of full disclosure and no disclosure has provoked great uncertainty. Rule 26 of the Alabama Rules of Civil Procedure seeks to lay the ground rules for striking the balance.

Rule 26(b)(3) of the Federal Rules of Civil Procedure has been described as an accurate codification of *Hickman*, supra, and later cases in the lower courts. Wright & Miller, *Federal Practice & Procedure, Civil*, § 2023 (1970). Rule 26(b)(3) of the Alabama Rules of Civil Procedure: (1) defines the class of materials that are given protection as work product, (2) sets out the showing (substantial need and undue hardship) required to obtain discovery of work product material, (3) gives absolute protection to an attorney's mental impressions, legal theories, and the like, (4) allows a party to obtain a copy of his own statement without a special showing, and (5) creates machinery by which a person not a party to the litigation who has given a statement concerning the action, may obtain a copy of his own statement. The rule of *Hickman*, supra, is no stranger to Alabama, having been recognized and applied in *Ex Parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967).

Subdivision (C)(82). Attorney-Client Privilege. Alabama's preexisting attorney-client privilege is a creature of the common law. See *Ex Parte Enzor*, 270 Ala. 254, 117 So.2d 361 (1960). That common law privilege, however, has been embodied in a statute. Ala. Code 1975, § 12-21-161. See C. Gamble, *McElroy's Alabama Evidence* § 388.02 (4th ed. 1991). Except as otherwise may be specifically indicated, Rule

502 is intended to embody the same privilege as set out in this former case law and statutory law. This rule, consequently, supersedes the preexisting statute. While generally carrying forward the former Alabama law concerning the attorney-client privilege, the language of Rule 502 is based largely upon the corresponding principle as expressed under the Uniform Rules of Evidence. See Unif. R. Evid. 502.

Rule 502 is not intended to describe or in any way limit the attorney work-product doctrine. See Ala. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947); *Ex Parte May*, 393 So.2d 1006 (Ala.1981).

Subdivision (C)(84). City Employee Disciplinary Records. In *Water Works and Sewer Bd. Of City of Talladega v. Consolidated Pub., Inc.*, 892 So.2d 859 (Ala. 2004), the Supreme Court of Alabama found that the disciplinary records of city water works and sewer board employees were exempt from disclosure in the Open Records Act until the conclusion of those employees' appeals of their disciplinary actions.

Subdivision (C)(85). Grand jury proceedings. For more on the confidentiality of grand jury proceedings, see *Ex Parte Birmingham News Co., Inc.*, 624 So.2d 1117 (Ala. Crim. App. 1993); *State v. Matthews*, 724 So.2d 1140 (Ala. Crim. App. 1998).

Subdivision (C)(86). In-Camera Review. For more on in-camera examinations of documents, see *Ex Parte Knox Kershaw, Inc.*, 562 So.2d 250 (Ala. 1990).

Rule 202. Confidential information.

The following information in a court record is not accessible to the public:

- (A) Social Security Numbers, employer or taxpayer identification numbers, and financial or medical account numbers of an individual;
- (B) Financial documents, such as income tax returns, W-2s and schedules, wage stubs, credit card statements, financial institution statements, check registers, and other financial information pursuant to Ala. Code § 40-2A-10;
- (C) The name of any minor child alleged to be the victim of a crime in any adult criminal proceeding;
- (D) The address, phone number, place of employment, and other related information about a criminal victim in a court file pursuant to Ala. Code § 15-23-69;

Task Force's Notes

For discussion on the redaction of identifying information, including personal data identifiers of minors, in appellate proceedings, see AL ST RAP Rule 52; AL ST RAP Rule 56.

Subsection (A). Social Security Numbers. Rule 5.1 of the Alabama Rules of Civil Procedure requires that, “[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains a Social Security number, a taxpayer-identification number, or a financial-account number, a party or nonparty making the filing may include only the last four digits of any such Social Security Number, taxpayer-identification number, or financial-account number.” Rule 5.1 also provides circumstances in which this redaction requirement does not apply.

ARTICLE III. PROCEDURES

Rule 301. Procedure to seal or otherwise restrict public access to records.

- (A) A party to an action may file a motion to seal a filing. Once this motion has been filed, the trial court shall not seal court records except upon a written finding that the moving party has proven, by clear and convincing evidence, that the information contained in the documents sought to be sealed falls within one of six categories:
- (1) Trade secrets or confidential commercial research or information;
 - (2) Information related to national security;
 - (3) Information whose release may promote scandal or defamation;
 - (4) Wholly private family matters, such as divorce, child custody, or adoption;
 - (5) Information that poses a serious threat of harassment, exploitation, or other particularized harm to the parties to the action; or
 - (6) Information that poses potential harm to third parties not in litigation.
- (B) If the information does in fact satisfy one of these categories, the court may seal the record, or any part of the record, at any time before, during, or after trial.

- (C) The court has an obligation to decide motions to seal on a case-by-case basis.
- (D) Where no party has filed a motion to seal, a trial court may still consider sealing a document, but the court must nevertheless hold a hearing as described in subsections (B) and (C).
- (1) The decision as to when court records should be sealed is left to the sound discretion of the court, subject to appellate review for abuse.

Task Force's Notes

The procedure to seal records, as laid out in Subsections (A) and (B), mirrors the procedure described in *Holland v. Eads*, 614 So.2d 102 (Ala. 1993). The appellate standard of review dictated in Subdivision (D)(1) is based on *Thompson v. State*, 153 So.2d 84, 107 (Ala. Crim. App. 2012) (quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983)).

This Section does not encroach upon or otherwise restrict a party's ability to file a motion for a protective order regarding discovery as articulated in Alabama Rules of Civil Procedure Rule 26(c). This Section also does not encroach upon or otherwise restrict a person's privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person as described in Alabama Rules of Evidence Rule 507.

Rule 302. Procedure to petition for access to sealed or otherwise restricted records.

A party to a civil action may file a request to the court to access a filing made under seal. Upon such a request, the party that made the filing under seal shall either provide the requesting party with the requested filing under seal or an unredacted copy or shall file a timely motion to be excused from providing such documents.

Rule 303. Procedure to redact information.

- (A) Unless the court orders otherwise, in an electronic or paper filing with the court that contains a Social Security number, a taxpayer-identification number, or a financial-account number, a party or nonparty making the filing may include

only the last four digits of any such Social Security number, taxpayer-identification number, or financial-account number.

(1) This redaction requirement does not apply to the following:

- (a) A financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (b) Information contained in the record of any administrative, agency, or court proceeding, if that record was not subject to the redaction requirement when originally created;
- (c) A filing governed by or subject to a statute, rule, regulation, or other provision of law that requires the inclusion of the information that would otherwise be subject to redaction by this rule; and
- (d) A filing covered by Alabama Code § 12-1A-10(B).

(2) Where a party shows good cause, the court may order the redaction of additional information.

(B) A court may order that a filing be made under seal. The court may later unseal the filing or order the party that made the filing to produce a redacted version for public record.

(C) The judge of probate, pursuant to Alabama Code § 12-13-22, may redact, remove, or otherwise make illegible a Social Security number or birthdate appearing in connection with a person's name that appears in any document, with the exception of federal and state tax liens, that conveys any interest in real or personal property or purports to encumber an interest in real or personal property and is recorded in the probate court, or any other document, including military discharge forms, that is filed as a public record in the probate court.

(1) Notwithstanding the foregoing, dates of birth shall not be redacted, removed, or otherwise made illegible on marriage certificates.

(2) The judge of probate may make such records available to the public in electronic format and publish such records on the Internet.

Task Force's Notes

For discussion on the determination of confidentiality of medical records as it relates to in-camera inspection, see *Schaefer v. State*, 676 So.2d 947 (Ala. Crim. App. 1995); *Ex Parte Alabama Dept. Mental Health and Mental Retardation*, 819 So.2d 591 (Ala. 2001).

ARTICLE IV. FEES

Rule 401. Court fees.

(A) Electronic access to the electronic docket and documents filed in the system is available for viewing to the public at no charge at the clerk's office during regular business hours.

(1) Except where parties to an action or their attorneys, along with governmental agencies, request a copy of the court record or document, the clerk shall charge a fee for a copy of the court record or document.

(a) The Administrative Director of Courts shall set the cost of the fee.

(b) If the requesting individual requests that the clerk forwards copies by mail, the clerk shall not pay for postage.

(B) General remote access to the public records of the court is available via a subscribers' service.

Suggestions Page

Suggestion #1: Alabama should consider having a system in place for handling bulk requests and compiled information requests, similar to that of South Dakota Codified Laws § 15-15A-12. The South Dakota statute reads as follows:

“(1) *Compiled information is defined as information that is derived from the selection, aggregation or reformulation by the Supreme Court*

of some of the information from more than one individual court record.

(2) *Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already available in an existing report. The Supreme Court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the Court, that the resources are available to compile the information and that it is an appropriate use of public resources. The State Court Administrator's Office will make the initial determination as to whether to provide the compiled information.*

(a) *Compiled information that includes information to which public access has been restricted may be requested by any member of the public only for scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes.*

(b) *The request shall a) identify what information is sought; b) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and c) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.*

(c) *The Supreme Court may grant the request and compile the information if it determines that doing so meets criteria established by the Court, is consistent with the purposes of the access rules, that the resources are available to compile the information, and that it is an appropriate use of public resources.*

(d) *If the request is granted, the Supreme Court may require the requestor to sign a declaration that:*

(i) *The data will not be sold or otherwise distributed directly or indirectly, to third parties, except for journalistic purposes;*

(ii) *The information will not be used directly or indirectly to sell a product or service to an individual or the general public, except for journalistic purposes; and*

(iii) *There will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.*

The Supreme Court may make such additional orders as may be needed to protect information to which access has been restricted or prohibited."

Alabama should also consider having a statement that prohibits the dissemination of bulk information for resale as well as any other bulk dissemination request or any bulk sealing request except as authorized by the court, like that of South Dakota Codified Laws § 15-15A-11. That South Dakota statute reads as follows:

"Dissemination of bulk information for resale is prohibited pursuant to § 1-27-1. Any other bulk dissemination is prohibited except as authorized by the State Court Administrator or the Chief Justice of the Supreme Court."

These two suggestions, if approved, would become a new Rule 303.

Suggestion #2: Alabama should consider having a redaction rule/procedure, like that of South Dakota Codified Laws § 15-15A-9 or Florida Statutes Annotated § 119.0714. The South Dakota statute reads as follows:

(1) *Social security numbers, employer or taxpayer identification numbers, and financial or medical account numbers of an individual where required to be filed with the court shall be submitted on a separate Confidential Information Form, appended to these rules, and filed with the pleading or other document required to be filed. The Confidential Information Form is not accessible to the public.*

(2) *Financial documents named in subdivision 15-15A-8(2) that are required to be filed with the court shall be submitted as a confidential document and designated as such to the clerk upon filing. The Confidential Financial Documents*

Information Form appended to these rules shall be attached to financial documents being filed with the court. The Confidential Financial Documents Information Form is not accessible to the public. The confidential financial documents will not be publicly accessible, even if admitted as a trial or hearing exhibit, unless the court permits access pursuant to § 15-15A-10. The court may, on its own motion, protect financial documents that have been submitted without the Confidential Financial Documents Information Form.

- (3) Names of any child under eighteen years of age alleged to be the victim of a crime in any adult criminal proceeding shall appear as initials only. The names shall be provided on a separate Confidential Information Form.
- (4) Court records in which a child under eighteen years of age is identified as the petitioner or respondent in a protection order proceeding shall be treated as confidential and excluded from public access.
- (5) Parties with cases filed prior to the effective date of this rule, or the court on its own, may, by motion, protect the privacy of confidential information as defined in § 15-15A-8. Parties filing this motion will submit a completed Confidential Information Form or Confidential Financial Documents Information Form as appropriate.”

The Florida statute reads as follows:

- “(1) Court files.—Nothing in this chapter shall be construed to exempt from s. 119.07(1) a public record that was made a part of a court file and that is not specifically closed by order of court, except:
- (a) A public record that was prepared by an agency attorney or prepared at the attorney’s express direction as provided in s. 119.071(1)(d).
 - (b) Data processing software as provided in s. 119.071(1)(f).
 - (c) Any information revealing surveillance techniques or procedures or personnel as provided in s. 119.071(2)(d).
 - (d) Any comprehensive inventory of state and local law enforcement resources, and any

comprehensive policies or plans compiled by a criminal justice agency, as provided in s. 119.071(2)(d).

- (e) Any information revealing the substance of a confession of a person arrested as provided in s. 119.071(2)(e).
- (f) Any information revealing the identity of a confidential informant or confidential source as provided in s. 119.071(2)(f).
- (g) Any information revealing undercover personnel of any criminal justice agency as provided in s. 119.071(4)(c).
- (h) Criminal intelligence information or criminal investigative information that is confidential and exempt as provided in s. 119.071(2)(h) or (m).
- (i) Social security numbers as provided in s. 119.071(5)(a).
- (j) Bank account numbers and debit, charge, and credit card numbers as provided in s. 119.071(5)(b).
- (k)
 1. A petition, and the contents thereof, for an injunction for protection against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing, dismissed at an ex parte hearing due to failure to state a claim or lack of jurisdiction, or dismissed for any reason having to do with the sufficiency of the petition itself without an injunction being issued on or after July 1, 2017, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.
 2. A petition, and the contents thereof, for an injunction for protection against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing, dismissed at an ex parte hearing due to failure to state a claim or lack of jurisdiction, or dismissed for any reason

having to do with the sufficiency of the petition itself without an injunction being issued before July 1, 2017, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution only upon request by an individual named in the petition as a respondent. The request must be in the form of a signed, legibly written request specifying the case name, case number, document heading, and page number. The request must be delivered by mail, facsimile, or electronic transmission or in person to the clerk of the court. A fee may not be charged for such request.

3. *Any information that can be used to identify a petitioner or respondent in a petition for an injunction against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking, and any affidavits, notice of hearing, and temporary injunction, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the respondent has been personally served with a copy of the petition for injunction, affidavits, notice of hearing, and temporary injunction.*

(l) *Personal identifying information and annuity contract numbers of a payee of a structured settlement as defined in s. 626.99296(2) and the names of family members, dependents, and beneficiaries of such payee contained within a court file relating to a proceeding for the approval of the transfer of structured settlement payment rights under s. 626.99296. Such information shall remain exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution during the pendency of the transfer proceeding and for 6 months after the final court order approving, or not approving, the transferee's application. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2027, unless reviewed and*

saved from repeal through reenactment by the Legislature.

(2) *Court records.--*

(a) *Until January 1, 2012, if a social security number or a bank account, debit, charge, or credit card number is included in a court file, such number may be included as part of the court record available for public inspection and copying unless redaction is requested by the holder of such number or by the holder's attorney or legal guardian.*

(b) *A request for redaction must be a signed, legibly written request specifying the case name, case number, document heading, and page number. The request must be delivered by mail, facsimile, electronic transmission, or in person to the clerk of the court. The clerk of the court does not have a duty to inquire beyond the written request to verify the identity of a person requesting redaction.*

(c) *A fee may not be charged for the redaction of a social security number or a bank account, debit, charge, or credit card number pursuant to such request.*

(d) *The clerk of the court has no liability for the inadvertent release of social security numbers, or bank account, debit, charge, or credit card numbers, unknown to the clerk of the court in court records filed on or before January 1, 2012.*

(e)

1. *The clerk of the court must keep social security numbers confidential and exempt as provided for in s. 119.071(5)(a), and bank account, debit, charge, and credit card numbers exempt as provided for in s. 119.071(5)(b), without any person having to request redaction.*

2. *Section 119.071(5)(a) 7. and 8. does not apply to the clerks of the court with respect to court records.*

(f) *A request for maintenance of a public records exemption in s. 119.071(4)(d) 2.*

made pursuant to s. 119.071(4)(d) 3. must specify the document type, name, identification number, and page number of the court record that contains the exempt information.

(g) The clerk of the court is not liable for the release of information that is required by the Florida Rules of Judicial Administration to be identified by the filer as confidential if the filer fails to make the required identification of the confidential information to the clerk of the court.

(3) Official records.—A person who prepares or files a record for recording in the official records as provided in chapter 28 may not include in that record a social security number or a bank account, debit, charge, or credit card number unless otherwise expressly required by law.

(a) If a social security number or a bank account, debit, charge, or credit card number is included in an official record, such number may be made available as part of the official records available for public inspection and copying unless redaction is requested by the holder of such number or by the holder's attorney or legal guardian.

1. If such record is in electronic format, on January 1, 2011, and thereafter, the county recorder must use his or her best effort, as provided in paragraph (d), to keep social security numbers confidential and exempt as provided for in s. 119.071(5)(a), and to keep complete bank account, debit, charge, and credit card numbers exempt as provided for in s. 119.071(5)(b), without any person having to request redaction.

2. Section 119.071(5)(a) 7. and 8. does not apply to the county recorder with respect to official records.

(b) The holder of a social security number or a bank account, debit, charge, or credit card number, or the holder's attorney or legal guardian, may request that a county recorder redact from an image or copy of an official record placed on a county recorder's publicly available Internet website or on a publicly available Internet

website used by a county recorder to display public records, or otherwise made electronically available to the public, his or her social security number or bank account, debit, charge, or credit card number contained in that official record.

1. A request for redaction must be a signed, legibly written request and must be delivered by mail, facsimile, electronic transmission, or in person to the county recorder. The request must specify the identification page number of the record that contains the number to be redacted.

2. The county recorder does not have a duty to inquire beyond the written request to verify the identity of a person requesting redaction.

3. A fee may not be charged for redacting a social security number or a bank account, debit, charge, or credit card number.

(c) A county recorder shall immediately and conspicuously post signs throughout his or her offices for public viewing, and shall immediately and conspicuously post on any Internet website or remote electronic site made available by the county recorder and used for the ordering or display of official records or images or copies of official records, a notice stating, in substantially similar form, the following:

1. On or after October 1, 2002, any person preparing or filing a record for recordation in the official records may not include a social security number or a bank account, debit, charge, or credit card number in such document unless required by law.

2. Any person has a right to request a county recorder to remove from an image or copy of an official record placed on a county recorder's publicly available Internet website or on a publicly available Internet website used by a county recorder to display public records, or otherwise made electronically available to the general

public, any social security number contained in an official record. Such request must be made in writing and delivered by mail, facsimile, or electronic transmission, or delivered in person, to the county recorder. The request must specify the identification page number that contains the social security number to be redacted. A fee may not be charged for the redaction of a social security number pursuant to such a request.

(d) If the county recorder accepts or stores official records in an electronic format, the county recorder must use his or her best efforts to redact all social security numbers and bank account, debit, charge, or credit card numbers from electronic copies of the official record. The use of an automated program for redaction is deemed to be the best effort in performing the redaction and is deemed in compliance with the requirements of this subsection.

(e) The county recorder is not liable for the inadvertent release of social security numbers, or bank account, debit, charge, or credit card numbers, filed with the county recorder.

(f) A request for maintenance of a public records exemption in s. 119.071(4)(d) 2. made pursuant to s. 119.071(4)(d) 3. must specify the document type, name, identification number, and page number of the official record that contains the exempt information.”

Additionally, Alabama should consider implementing a limited immunity provision for clerks, such as that of Alabama Code § 12-17-5 or Rule 31(I) of the Rules of Judicial Administration. The Alabama statute reads as follows:

“In the performance of any duties provided for by Sections 12-17-94(a) and 12-17-251(c), every magistrate and clerk of the circuit and district courts of this state shall have absolute judicial immunity

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from any liability arising from the execution of the duties provided for by Sections 12-17-94(a) and 12-17-251(c).”

Rule 31(I) reads as follows:

“(1) **Protection of Identifying Information and Confidential Records.** *Unless otherwise provided by law, any data, report, or compilation of information produced by the clerk or other official custodian of court records for public disclosure shall exclude the personal identifying information of any individual. Identifying information may include all nine (9) digits of an individual’s Social Security number; an individual’s date of birth, credit card numbers, bank account numbers, other personal financial information, or any other information declared to be identifying information by the ADC. The ADC may promulgate policies and procedures for the clerk or other official custodians of court records to follow in order to safeguard identifying information or other personal information that the ADC determines should be protected from public disclosure. The clerk or other official custodian of court records shall not be responsible for identifying information included on any document filed in the clerk’s office. Any individual filing a document that requires or contains an individual’s personal identifying information may make proper request under these Rules or other applicable rules to protect the contents of such documents from public disclosure.”*

These two suggestions, if approved, would comprise a new subsection (D) of current Rule 303 (Procedure to redact information).

Suggestion #3: Alabama should consider adapting a penalties rule from Rule 37 of the Alabama Rules of Civil Procedure for noncompliance. The relevant portion of Rule 37 reads as follows:

“(b) *Failure to comply with order.*

(1) **SANCTIONS BY A CIRCUIT JUDGE OR COURT IN PLACE WHERE DEPOSITION IS TAKEN OR PRODUCTION SOUGHT.** *If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit judge or, when the deposition is being taken outside the*

state, by the court in the place in which the deposition is being taken; or, if a person, not a party, fails to permit production of documents or entry upon land under Rule 45(a)(3) after being directed to do so by a circuit judge or, when production or entry is sought outside the state, by the court in the place where the documents, things, or land are located, the failure may be considered a contempt of court.

- (2) **SANCTIONS BY COURT IN WHICH ACTION IS PENDING.** *If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:*
- (A) *An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;*
 - (B) *An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;*
 - (C) *An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;*
 - (D) *In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;*
 - (E) *Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another*

for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”

This suggestion, if approved, would create a new Article V and Rule 501.

Suggestion #4: Alabama should consider creating and using forms or providing standard form templates as it relates to court record confidentiality.

This suggestion, if approved, would create an Appendix of forms and templates. ▲

Endnotes

1. For example, abortion records and other information involving court proceedings conducted pursuant to Ala. Code § 26-21-4; abuse and neglect files and records pursuant to Ala. Code §§ 26-14-8(c) and 15-1-2; adoption files and adoption court records pursuant to Ala. Code § 26-10A-31; audio recordings of 911 calls subject to the provisions of Ala. Code § 11-98-12; criminal history pursuant to Ala. Code §§ 27-9A-17, 27-25-4.4, 27-25-4.6, and 41-9-642; domestic abuse victim's home address, business address, home telephone number, business telephone number, the home or business address or telephone number of any member of the victim's household, and any address that may reveal the confidential location of a shelter for victims of domestic violence pursuant to Ala. Code § 30-5-5; parole or probation records subject to privilege pursuant to Ala. Code § 12-26-7(f); information and records acquired by child death review teams pursuant to Ala. Code § 26-16-98; information regarding motor vehicle registration suspension or reinstatement status pursuant to Ala. Code § 32-7A-24; information that is confidential or privileged pursuant to Ala. Code §§ 12-21-131(i), 15-23-42, 34-8A-21, and Rule 503 of the Alabama Rules of Evidence; law enforcement files concerning a child pursuant to Ala. Code § 12-15-134; presentence investigation reports pursuant to Ala. Code § 13A-5-47; records concerning the accreditation, quality assurance, and similar materials pursuant to Ala. Code § 22-21-8; records furnished to quality control committee, peer review committee, or professional standards committee pursuant to Ala. Code § 6-5-333; reports of criminal history background received by the Department of Human Resources pursuant to Ala. Code § 38-13-8; records of domestic violence fatality review pursuant to Ala. Code § 30-9-2; records of hearings involving the suspension or revocation of medical licenses pursuant to Ala. Code § 34-24-361.1; records relating to a conviction or adjudication in a DUI case for an under-21 individual pursuant to Ala. Code § 32-5A-191(b); records related to investigation of an infected health care worker pursuant to Ala. Code § 22-11A-69; trade secrets pursuant to Ala. Code §§ 8-27-2, 22-30-18, and 27-22-25; treatment records of drug offenders pursuant to Ala. Code § 12-23A-10(c); vital records pursuant to Ala. Code § 22-9A-21; and registration, circulation records and information concerning the use of the public, public school or college and university libraries, per Ala. Code § 36-12-40.
2. See, e.g., *Holland v. Eads*, *supra*, at 1014 which states:

“Limitations of the public's right to inspect” must be strictly construed and must be applied only in those cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting dis-

closure.” *Chambers v. Birmingham News Co.*, 552 So.2d 854, 856 (Ala. 1989). The party refusing disclosure bears the burden of “proving that the writings or records sought are within an exception and warrant nondisclosure of them.” *Chambers*, at 856–57; *Ex parte CUNA Mutual Ins. Society*, 507 So.2d 1328, 1329 (Ala. 1987); *Ex parte McMahan*, 507 So.2d 492, 493 (Ala. 1987). This Court has held that the following types of records do not warrant disclosure: “[r]ecorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public.” *Stone*, 404 So.2d at 681.”

3. See, e.g., appellate mediation records pursuant to Rule 8 of Alabama Rules of Appellate Mediation; attorney discipline records pursuant to Rule 30 of the Alabama Rules of Disciplinary Procedure; custody or visitation dispute mediation proceedings pursuant to Alabama Civil Court Mediation Rule 11; depositions which have been sealed by an officer and filed with the court pursuant to Rule 30 of the Alabama Rules of Civil Procedure; judicial disciplinary proceedings pursuant to Alabama Constitution Article VI § 156(b) and Alabama Rules of Procedure of the Judicial Inquiry Commission Rule 5; unexecuted search warrants, which have been sealed for confidentiality, pursuant to Rule 3.14 of the Alabama Rules of Criminal Procedure; privileged confidential communications between attorney and client pursuant to Rule 502 of the Alabama Rules of Evidence; privileged material prepared in anticipation of litigation by a party's attorney or representative pursuant to Rule 26 of the Alabama Rules of Civil Procedure.
4. Members of the Joint Task Force have included - **Judge Scott Donaldson** (formerly a judge of the Court of Civil Appeals and now practicing in Tuscaloosa with Rosen Harwood); **David G. Wirtes, Jr.**, Cunningham Bounds, Mobile; **Chris Weller**, Capell & Howard, Montgomery; **Richard Raleigh**, Womble, Bond, Dickinson, Huntsville; **Rebekah McKinney**, Watson McKinney, Huntsville; **Evans Bailey**, Rushton Stakely; **David Kimberly**, Deputy Director of the Alabama Law Institute; **Carla Woodall**, Houston County Circuit Clerk; **Othni Lathram**, Alabama Legislative Services Agency; **Scott Mitchell**, Clerk of Alabama Court of Criminal Appeals; **Nathan Wilson**, Clerk of Alabama Court of Civil Appeals; **Michael Hill**, Alabama Legislative Services Agency; **Brad Maderis**, Staff Attorney with the Alabama Supreme Court; **Wendy Crew** of Birmingham; **Randy Nichols**, Massey Stotser & Nichols, Birmingham; **Jackson Colburn**, Attorney with the Alabama Law Institute; **Mary Margaret Bailey**, Frazer Green & Upchurch, Mobile; **Julia Weller**, former Clerk of the Alabama Supreme Court.
5. Former judge of the Alabama Court of Civil Appeals.

David G. Wirtes, Jr.



Dave Wirtes is a member of Cunningham Bounds LLC in Mobile.

Scott Donaldson



Scott Donaldson is a former trial and appellate judge and now a shareholder with Rosen Harwood PA in Tuscaloosa, with a statewide mediation, appellate, and trial practice.

ALABAMA LAWYERS HALL OF FAME

It is significant and appropriate that during what is traditionally considered Law Week, the first week of May, we honor and recognize the new group of inductees into our Alabama Lawyers Hall of Fame.

We have conducted 19 induction ceremonies, and with our current selectees, we have now honored 90 lawyers from throughout the history of the state of Alabama.

The selection process for the Hall of Fame is both simple and complex. The committee seeks nominations from lawyers, the families of potential honorees, the nominee's associates, historians, interested citizens, and the public in general. Anyone can complete the nomination form putting forth the names of lawyers who have by their accomplishments brought honor to themselves, the state, and the legal profession. Then the hard part begins where the committee meets to review nominations, discuss lifetime achievements, and choose inductees.

Honorees must be preeminent exemplars of the legal profession. They have been nominated because they have had a distinguished career in the law. This is demonstrated through many different forms of achievement, leadership, service, mentorship, political courage, or professional success. Each inductee must have

been deceased at least two years at the time of their selection. And then comes another challenge. Among the honorees, at least one must have been deceased a minimum of 100 years. This means that no one will have known the potential honoree personally, and the committee will be solely dependent on history books, written records, and the results of their deeds subject to the judgment of time. Thus, we consider the totality of a person's life. That places a tremendous responsibility on the committee.

Over the years we have recognized men and women; Black and white attorneys; judges, both appellate and trial, both federal and state; military heroes; public servants; law professors; a clerk of the Alabama Supreme Court and reporter of decisions; assistant U.S. Attorneys; governors; senators; members of congress; mayors; city councilors; an ambassador; a speaker of the house of representatives; and a vice president of the United States. But our largest single demographic is the group of lawyers, all outstanding individuals, who have labored in the field of private practice. All our lawyer-inductees are the true giants, the mentors, and, yes, the heroes of our profession. Their plaques are in the lower rotunda of the Heflin-Torbert Judicial Building, and together they form a very impressive collection.

Our 12-member selection committee consists of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the board of bar commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar. This committee meets to consider the nominees and to make selections for induction.

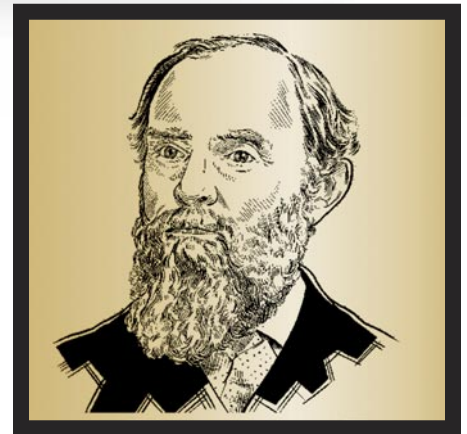
I encourage anyone to consider making a nomination for our Alabama Lawyers Hall of Fame. The nomination form and instructions can be found on the Alabama State Bar's website, <https://www.alabar.org/about/alabama-lawyers-hall-of-fame/>. I say this each year, but remember, great lawyers cannot be considered for induction into the hall if they have not first been nominated.

Below are the new inductees to the Alabama Lawyers Hall of Fame. We hope that all their stories will serve to inspire the present and future citizens of Alabama. ▲
—Samuel A. Rumore, Jr.
Chair, Alabama Lawyers Hall of Fame Selection Committee



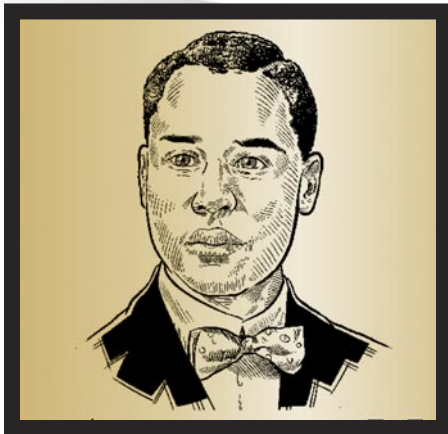
**HAROLD VAUGHN HUGHSTON
(1915-1981)**

Born in Tuscumbia, Alabama, graduated from University of Alabama School of Law; admitted to Alabama State Bar in 1940; Colbert County Solicitor; served in U.S. Army; Judge of Colbert County Law and Equity Court; Circuit Judge of 11th and 31st Circuits; attorney for City of Tuscumbia and Colbert County; President of Alabama State Bar, University's Law School Foundation, Law Alumni Association, Farrah Law Society, University's National Alumni Association, and Colbert County Bar; bar commissioner; chairman of University President's Cabinet and Tuscumbia school board; member of Alabama Law Institute and American Bar Association; practiced law until death in 1981.



**JAMES TAYLOR JONES
(1832-1895)**

Born in Richmond, Virginia; a relative of President Zachary Taylor, moved to Marengo County in 1834; received both Bachelor's and Master's degrees from Princeton; awarded law degree from University of Virginia in 1855; admitted to Alabama State Bar (1856); elected mayor of Demopolis (1860); practiced law until Civil War; served as Judge Advocate General of the Confederate War Department until the end of the war, elected to Alabama Constitutional Convention (1865); served four terms in Congress; advocated public funding for black school children; served as circuit judge in Demopolis until his death in 1895.



**ARTHUR ALEXANDER MADISON
(1883-1957)**

Born in Montgomery, Alabama; graduated from State Normal School (present Alabama State University) in 1905; began collegiate studies at Howard University and finished at Bowdoin College; only black student in class; graduated cum laude (1910); opened "Madison's Shoe and Dry Goods Store" in Montgomery; formed The National Realty and Investment Company; earned a degree from Teacher's College at Columbia University; earned a law degree from Columbia (1923); admitted to New York State Bar (1924); president of Harlem Lawyers Association; helped organize the International Divine Righteous Government Convention (1936); admitted to Alabama State Bar (1938); helped Rosa Parks register to vote.



**CLARENCE FROST RHEA
(1921-2005)**

Born in Attalla, Alabama; earned undergraduate degree from University of Alabama (1943) and law degree from University of Virginia (1948); served in World War II and Korean War; retired from Army Air National Guard as a Brigadier General; president of both 84th and 31st Infantry Division Societies and Etowah County Bar Association; member of American Bar Association, Association of Trial Lawyers of America, and American Judicature Society; served as judge advocate for Civitan International's Alabama District North; city attorney for Attalla and other municipalities; served on the board of Salvation Army; practiced law until his death.



**JANIE LEDLOW SHORES
(1932-2017)**

Born in Butler County; graduated from University of Alabama School of Law; admitted to practice law in 1959; law clerk to Justice Simpson; opened a law practice in Selma; worked on legal staff at Liberty National Life Insurance; became first female law professor at Cumberland Law School (1966); named Legal Advisor to Alabama Constitutional Revision Commission (1973); became first woman on Supreme Court of Alabama (1974); recommended for nomination to U.S. Supreme Court; retired from the bench in 2000; awarded Maud McLure Kelly Award, Brewer/Torbert Public Service Award, and Sam Pipes Award; inducted into Alabama Women's Hall of Fame. ▲

ALABAMA LAWYERS HALL OF FAME

PAST INDUCTEES

2021

Charles Baker Arendall, Jr. (1915-1993)
Jerome Alfred Cooper (1913-2003)
Douglas Phillip Corretti (1921-2009)
William Hooper Council (1849-1909)
James Oscar Sentell, Jr. (1909-1985)

2020

Cecil Howard Strawbridge (1906-1999)
Helen Shores Lee (1941-2018)
Henry Minor (1783-1838)
Jane Kimbrough Dishuck (1923-2009)
William Burton Hairston, Jr. (1924-2015)

2019

Clifford J. Durr (1899-1975)
Broox G. Garrett (1915-1991)
Henry W. Hilliard (1808-1892)
Richard T. Rives (1895-1982)
Ellene G. Winn (1911-1986)

2018

Jeremiah Clemens (1814-1865)
Carl Atwood Elliott, Sr. (1913-1999)
Robert A. Huffaker (1944-2010)
Henry Upson Sims (1873-1961)
George Peach Taylor (1925-2008)

2017

Bibb Allen (1921-2007)
Mahala Ashley Dickerson (1912-2007)
John Cooper Godbold (1920-2009)
Alto Velo Lee, III (1915-1987)
Charles Tait (1768-1835)

2016

William B. Bankhead (1874-1940)
Lister Hill (1894-1984)
John Thomas King (1923-2007)
J. Russell McElroy (1901-1994)
George Washington Stone (1811-1894)

2015

Abe Berkowitz (1907-1985)
Reuben Chapman (1799-1882)
Martin Leigh Harrison (1907-1997)
Holland McTyeire Smith (1882-1967)
Frank Edward Spain (1891-1986)

2014

Walter Lawrence Bragg (1835-1891)
George Washington Lovejoy (1859-1933)
Albert Leon Patterson (1894-1954)
Sam C. Pointer, Jr. (1934-2008)
Henry Bascom Steagall (1873-1943)

2013

Marion Augustus Baldwin (1813-1865)
T. Massey Bedsole (1917-2011)
William Dowdell Denson (1913-1998)
Maud McLure Kelly (1887-1973)
Seybourn Harris Lynne (1907-2000)

2012

John A. Caddell (1910-2006)
William Logan Martin, Jr. (1883-1959)
Edwin Cary Page, Jr. (1906-1999)
William James Samford (1844-1901)
David J. Vann (1928-2000)

2011

Roderick Beddow, Sr. (1889-1978)
John McKinley (1780-1852)
Nina Miglionico (1913-2009)
Charles Morgan, Jr. (1930-2009)
William D. Scruggs, Jr. (1943-2001)

2010

Edgar Thomas Albritton (1857-1925)
Henry Hitchcock (1792-1839)
James E. Horton (1878-1973)
Lawrence Drew Redden (1922-2007)
Harry Seale (1895-1989)

2009

Francis Hutcheson Hare, Sr. (1904-1983)
James G. Birney (1792-1857)
Michael A. Figures (1947-1996)
Clement C. Clay (1789-1866)
Samuel W. Pipes, III (1916-1982)

2008

John B. Scott (1906-1978)
Vernon Z. Crawford (1919-1985)
Edward M. Friend, Jr. (1912-1995)
Elisha Wolsey Peck (1799-1888)

2007

John Archibald Campbell (1811-1889)
Howell T. Heflin (1921-2005)
Thomas Goode Jones (1844-1914)
Patrick W. Richardson (1925-2004)

2006

William Rufus King (1776-1853)
Thomas Minott Peters (1810-1888)
John J. Sparkman (1899-1985)
Robert S. Vance (1931-1989)

2005

Oscar W. Adams (1925-1997)
William Douglas Arant (1897-1987)
Hugo L. Black (1886-1971)
Harry Toulmin (1766-1823)

2004

Albert John Farrah (1863-1944)
Frank M. Johnson, Jr. (1918-1999)
Annie Lola Price (1903-1972)
Arthur Davis Shores (1904-1996)

The Alabama Lawyers Hall of Fame is located on the ground floor of the Heflin-Torbert Judicial Building,
300 Dexter Avenue, Montgomery, Alabama



NOTICE

DISCIPLINARY NOTICES

▲ Transfers to Inactive Status

▲ Disbarments

▲ Suspensions

▲ Public Reprimands

Transfers to Inactive Status

- New Orleans attorney **Larue Haigler, III**, also licensed in Alabama, was transferred to inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective February 28, 2023, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the February 28, 2023 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Haigler's petition submitted to the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2023-376]
- Montgomery attorney **William Clay Teague** transferred to inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective March 16, 2023, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the March 16, 2023 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to Teague's petition submitted to the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2023-359]

Disbarments

- Vestavia attorney **Chase Tristian Espy** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 12, 2023. The Supreme Court of Alabama entered its order based upon the March 8, 2023 order of Panel III of the Disciplinary Board of the Alabama State Bar. The Supreme Court of Alabama entered its order based on the Disciplinary Board's acceptance of Espy's consent to disbarment, which was based on his recent federal conviction for possession of child pornography. [Rule 23, Pet. No. 2023-341]
- Birmingham attorney **Donald Varnado Watkins** was disbarred from the practice of law in Alabama, effective September 13, 2019, by the order of the Supreme Court of Alabama, issued December 27, 2021. The Supreme Court of Alabama entered its order based on the order of the Disciplinary Commission of the Alabama State Bar disbarring Watkins after he was convicted of one count of conspiracy to commit wire fraud, multiple counts of wire fraud (aiding and abetting), and multiple counts of bank fraud (aiding and abetting) by the United States District Court for the Northern District of Alabama on July 16, 2019. [Rule 22(a), Pet. No. 2019-1019; ASB No. 2016-1192]

Suspensions

- Birmingham attorney **Benita Bell Jenkins** was suspended from the practice of law in Alabama for 90 days, with the suspension to be held in abeyance pending successful completion of her period of supervised probation. Jenkins was placed on probation for two years. The suspension was based upon the Disciplinary Commission's acceptance on February 10, 2021 of Jenkins's conditional guilty plea, wherein Jenkins pled guilty to violating Rules 1.3 [Diligence], 5.3(b) [Responsibilities of Nonlawyer Assistants], and 8.4(a) and (g) [Misconduct], Alabama Rules of Professional Conduct. Jenkins admitted that she failed to properly and diligently follow the billing guidelines promulgated by the Office of Indigent Defense Services resulting in multiple fee declarations filed late and billing entries erroneously submitted for work performed after multiple matters were concluded. Further, Jenkins admitted that she failed to properly supervise a non-lawyer employee. [ASB No. 2019-1079]
- Dallas, Texas attorney **Parrish Scott Nordan** was summarily suspended from the practice of law in Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by the Disciplinary Commission of the Alabama State Bar, effective February 9, 2023, for failing to respond to multiple formal requests that he provide a substantive written response concerning a disciplinary matter. Nordan subsequently submitted a substantive written response and on February 27, 2023, effectively motioned for dissolution of the summary suspension. On March 1, 2023, the Disciplinary Commission granted the motion and ordered the summary suspension dissolved. [Rule 20(a), Pet. No. 2023-201]

- Phenix City attorney **Nicholas Andrew Palerino** was suspended from the practice of law in Alabama for four years by order of the Supreme Court of Alabama, effective April 24, 2023. The Supreme Court of Alabama entered its order based on the Disciplinary Commission's order

of March 10, 2023, accepting Palerino's conditional guilty plea wherein Palerino admitted to violating Rules 8.4(b) and (g), Alabama Rules of Professional Conduct. Palerino was indicted by the Lee County Grand Jury for reckless manslaughter. The indictment alleged Palerino's

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(Continued from page 237)

reckless driving caused the death of another person by operating a vehicle in a reckless or grossly negligent manner. Specifically, it was alleged that Palerino was looking at his phone while operating a vehicle resulting in a traffic accident that caused the death of another person. On February 3, 2023, Palerino pled guilty to reckless manslaughter and was subsequently sentenced to a prison term of 15 years, split to serve one year in the Lee County Detention Center. After his release Palerino will be required to serve two years unsupervised probation. [ASB No. 2023-211]

Public Reprimands

- Elba attorney **Alyse Phillips Fowler** was issued a public reprimand with general publication on March 10, 2023, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 8.4(b), (c), and (g) [Misconduct], Alabama Rules of Professional Conduct. On November 8, 2022, Fowler pled guilty to a Class A misdemeanor charge of providing false information to register to vote, a violation of Alabama Code § 17-17-46. Fowler knowingly provided a false address when registering to vote in the Elba municipal election. Fowler was given a suspended six-month jail sentence, 12 months unsupervised probation, fined \$1,000 plus court costs, and ordered to complete 50 hours of community service. [ASB No 2022-324]
- Huntsville attorney **Jon Davidson Levin** was issued a public reprimand with general publication on March 10, 2023, for violating Rules 1.2(c) [Scope of Representation], 1.4 [Communication], 1.7(b) [Conflict of Interest: General Rule], and 2.2 [Intermediary], Alabama Rules of Professional Conduct. In 2013, Levin began representing multiple business entities comprising a multinational enterprise engaged in government contracting to the U.S. government in support of its Middle East operations. The entities had overlapping ownership and leadership. In September 2016, the clients received notice that the primary U.S.-based client had received a CENTCOM-wide Base Debarment, requiring ejection from a U.S. military base in Afghanistan within 10 days absent a solution satisfactory to the U.S. government. Subsequently, Levin was advised by the clients' corporate representatives that the deadline was shortened to seven days. The clients also informed Levin that the base debarment threatened catastrophic loss to the business enterprise. Levin presented the clients with several options regarding how to remedy this situation. The clients elected, three days before the deadline, to have one affiliated corporation acquire the assets of its base-debarred affiliate. This decision resulted in Levin having a conflict of interest in handling the transaction but without adequate time to involve outside counsel. Levin explained to the clients that their role in the transaction would be limited to preparing documents to accomplish the clients' collective decision and objectives and that Levin could not be involved in negotiating the economic terms of the transaction between the clients. Levin proceeded with preparing the transaction documents with the understanding that their clients agreed to the limited scope of our representation. Levin did not fully explain the benefits, limitations, and risks of the joint representation as required by Rules 1.7(b) and 2.2, Alabama Rules of Professional Conduct and did not obtain the clients' written acknowledgment of the limited scope representation as required by Rule 1.2, Alabama Rules of Professional Conduct. Further, Levin did not communicate with all the corporate representatives of the client entities on an equal basis as required by Rules 1.4 and 2.2, Alabama Rules of Professional Conduct.
- A Socorro, Texas attorney, also licensed in Alabama, **Jimmy Lee Revis**, was issued a public reprimand without general publication on March 10, 2023, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.1 [Competence], 1.3 [Diligence], 5.5 [Unauthorized Practice of Law], and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. In 2020, the attorney undertook to represent his niece and her family on immigration matters. The niece and her family came to the United States in November 2019 on a visitor visa which expired on May 27, 2020. Shortly before the visas expired, the attorney attempted to file paperwork which would begin the process of seeking legal residence in the United States. However, the applications were rejected. In the interim, the visas expired after the attorney failed to file for an extension of the visas. As a result, the niece and her family were now deemed to be in the United States illegally, impairing their ability to seek legal residence in the United States. There was no record of the attorney having entered an appearance on their behalf before immigration. Upon receipt of the attorney's self-report, it was discovered the attorney last held an occupational license in 2017. The attorney was unlicensed in 2018 and 2019, and then held a special

membership license for 2020 and 2021. A special membership license does not allow a lawyer to engage in the private practice of law. [ASB No. 2021-893]

- Huntsville attorney **John Andrew Watson, III** was issued a public reprimand with general publication on March 10, 2023, for violating Rules 1.2(c) [Scope of Representation], 1.4 [Communication], 1.7(b) [Conflict of Interest: General Rule], and 2.2 [Intermediary], Alabama Rules of Professional Conduct. In 2013, Watson began representing multiple business entities comprising a multinational enterprise engaged in government contracting to the U.S. government in support of its Middle East operations. The entities had overlapping ownership and leadership. In September 2016, the clients received notice that the primary U.S.-based client had received a CENTCOM-wide Base Debarment, requiring ejection from a U.S. military base in Afghanistan within 10 days absent a solution satisfactory to the U.S. government. Subsequently, Watson was advised by the clients' corporate representatives that the deadline was shortened to seven days. The clients also informed Watson that the base debarment threatened catastrophic loss to the business enterprise. Watson presented the clients with several options regarding how to remedy this situation. The clients elected, three days before the deadline, to have one affiliated corporation acquire the assets of its base-debarred affiliate. This decision resulted in Watson having a conflict of interest in handling the transaction but without adequate time to involve outside counsel. Watson explained to the clients that their role in the transaction would be limited to preparing documents to accomplish the clients' collective decision and objectives and that Watson could not be involved in negotiating the economic terms of the transaction between the clients. Watson proceeded with preparing the transaction documents with the understanding that their clients agreed to the limited scope of our representation. Watson did not fully explain the benefits, limitations, and risks of the joint representation as required by Rules 1.7(b) and 2.2, Alabama Rules of Professional Conduct and did not obtain the clients' written acknowledgement of the limited scope representation as required by Rule 1.2, Alabama Rules of Professional Conduct. Further, Watson did not communicate with all the corporate representatives of the client entities on an equal basis as required by Rules 1.4 and 2.2, Alabama Rules of Professional Conduct. ▲



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LEGISLATIVE WRAP-UP



This column will cover noteworthy legislation that passed during the 2023 Legislative Session. During this session, there were 712 general bills, 149 local bills, and 15 proposed constitutional amendments introduced, for a total of 876 bills. At the end of the session, there were 397 total bills that were enacted, including 275 general bills, 118 local bills, and four proposed constitutional amendments. Given the volume of acts adopted, this column will only highlight select bills most likely to be encountered by practitioners around this state. Practice areas highlighted here include Alcoholic Beverages, Businesses and Financial Institutions, Crimes and Offenses, Criminal Law and Procedure, Courts, Economic Development, Education, Environment and Natural Resources, Family Law, Health, Motor Vehicles, State Government, and Taxation. Summaries of every general act can be found on the website of the Alabama Legislature at <https://alison.legislature.state.al.us/> under the Legislative Services Agency (LSA) Legal Division Publications.

Alcoholic Beverages

Donations of Alcoholic Beverages to Nonprofit (Act 2023-136, SB117)

Senator J.T. “Jabo” Waggoner

This act authorizes a licensed manufacturer or importer of alcoholic beverages to donate up to 4.5 liters of alcoholic beverages to a licensed nonprofit special event. Effective August 1, 2023

Curbside Pick-up (Act 2023-287, HB166)

Representative Parker Moore

This act modifies the amount of alcoholic beverages a licensee of the ABC Board may sell using curbside pick-up to a customer each day by: (1) increasing liquor for non-restaurants from 1 liter to 9,000 milliliters; (2) capping liquor at 375 milliliters for restaurants and requiring the liquor to accompany a food order; (3) increasing table wine from 1,500 milliliters to 9,000 milliliters; (4) increasing packaged beer from 288 ounces to 120 12-ounce containers; and (5) capping draft beer at 288 ounces. Effective August 1, 2023

Food and Beverage Trucks (Act 2023-523, HB304)

Representative Neil Rafferty

This act amends the provision which authorizes and regulates alcoholic beverage sales by food and beverage trucks within Class 1 municipalities to: (1) remove the provision limiting this section to Class 1 municipalities to effectively expand the provisions to an entertainment district within any municipality; (2) prohibit a food or beverage truck licensee from serving food or beverage within 150 feet of any entrance to any permanent restaurant or Alcoholic Beverage Control Board licensee; and (3) authorize the board, by rule, to require security cameras in all

licensed food or beverage trucks. Effective September 1, 2023

Business and Financial Institutions

Uniform Commercial Code Amendments (2022) (Act 2023-492, HB348)

Representative David Faulkner

This act adopts the Uniform Commercial Code Amendments (2022) by amending a substantial portion of the Uniform Commercial Code and adding Article 12 to the Uniform Commercial Code, Title 7, Code of Alabama 1975, to: (1) govern the property rights of certain intangible digital assets, including electronic rights to payment; (2) provide for a manner to establish the transfer and control of those assets; (3) provide a mechanism for evidencing certain rights of payment; (4) adopt special rules with regard to the payment obligations and conditions of discharge account debtors on controllable accounts and controllable payment intangibles; (5) provide transitional provisions for the Uniform Commercial Code (2022); (6) clarify the meaning of the term “chattel paper” and other definitions; and (7) provide for the perfection of security interests in controllable electronic records, documents of title, chattel paper, and other assets. Effective July 1, 2024

Alabama Business and Nonprofit Entity Code (Act 2023-503, HB267)

Representative Tim Wadsworth

This act (1) revises the Alabama Nonprofit Corporation Law to reflect the national standards set by the Model Nonprofit Corporation Act of 2021 and the Delaware General Corporation Law; and (2) makes conforming changes to effectuate the changes to the Alabama

Nonprofit Corporation Law and conform with the other entities governed by the Alabama Business and Nonprofit Entity Code. Effective January 1, 2024

Crimes and Offenses

Trafficking Fentanyl (Act 2023-4, HB1)

Representative Matt Simpson

This act (1) imposes a mandatory minimum sentence for trafficking fentanyl with the penalty based on the amount trafficked as follows: a minimum of three years for trafficking one or more grams but less than two grams, a minimum of 10 years for two or more grams but less than four grams, a minimum of 25 years for four

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or more grams but less than eight grams, and life imprisonment for eight or more grams; and (2) in addition to the mandatory minimum sentence, imposes an additional five years for a second offense and an additional 10 years for a third or subsequent offense. Effective July 1, 2023

Loitering (Act 2023-245, HB24)

Representative Reed Ingram

This act (1) prohibits loitering on a public highway or in the right-of-way of a public road; (2) prior to making an arrest for a violation of this act, allows a law enforcement officer to instruct a person in violation to leave the area and offer to transport him or her to a location in the jurisdiction that offers emergency housing; and (3) provides that a second or subsequent loitering violation in the same jurisdiction is a Class C misdemeanor. Effective August 1, 2023

Doxing (Act 2023-369, HB287)

Representative Shane Stringer

This act creates the crime of doxing, which is committed when an individual does either of the following: (1) intentionally electronically publishes personal identifying information of another individual, with intent to cause harassment or harm to that individual, and the individual is actually harassed or harmed; or (2) intentionally electronically publishes personal identifying information of a law enforcement officer, firefighter, or public servant, with the intent to cause harassment or harm to that individual, and the individual is actually harassed, harmed, or impeded from performing his or her governmental function. A violation of this act

is a Class A misdemeanor, and a second or subsequent violation is a Class C felony. Effective September 1, 2023

Controlled Substances (Act 2023-387, HB82)

Representative Chris Pringle

This act (1) further provides for the crime of manslaughter to include knowingly selling, furnishing, giving away, delivering, or distributing a controlled substance to a person in violation of Section 13A-12-211, Code of Alabama 1975, after which the person dies as a proximate use of the controlled substance; and (2) exempts licensed physicians, licensed pharmacists, and licensed dentists engaging in the scope of his or her practice from prosecution under this section. Effective September 1, 2023

Distracted Driving (Act 2023-478, SB301)

Senator J.T. "Jabo" Waggoner

This act (1) prohibits certain distracted driving including swerving, crossing traffic lanes without a signal, or otherwise operating a vehicle in an impaired manner while also physically holding, supporting, or using a wireless telecommunications device, except to use voice-based or hands-free communications, to use a navigational system, to use a device mounted to the vehicle and operational with one motion, in the case of an emergency, or when the vehicle is parked; (2) provides that a person who violates this act shall be guilty of a Class C misdemeanor and subject to a fine, except that a person who produces in court a device or proof of purchase of a device that would allow him or her to comply with the act shall not be guilty; and

(3) provides that a law enforcement officer may only issue a written warning for a violation within the first 12 months after the effective date of this act. This act also (1) amends Section 32-5A-351, Code of Alabama 1975, to provide that a first conviction shall be a one-point violation on an individual's driving record, a two-point violation for a second conviction, and a three-point violation for a third or subsequent conviction; and (2) repeals the former texting while driving law, Section 32-5A-350, Code of Alabama 1975. Effective June 14, 2023

Electronic Stalking (Act 2023-481, HB153)

Representative Allen Treadaway

This act (1) creates the crime of electronic stalking; (2) provides that any person who places an electronic tracking device on the property of another with the intent to surveil, stalk, or harass, or for any other unlawful purpose, has committed electronic stalking and is guilty of a Class C felony; (3) creates the crime of electronic stalking in the second degree; (4) provides that any person who places an electronic tracking device on the property of another, except as authorized by law, has committed electronic stalking in the second degree and is guilty of a Class A misdemeanor; and (5) provides jurisdictional requirements for criminal proceedings relating to electronic stalking. Effective September 1, 2023

Chemical Endangerment of A First Responder (Act 2023-486, HB230)

Representative Matt Simpson

This act creates the crime of chemical endangerment of a first responder,

which is committed when a person knowingly, recklessly, or intentionally causes or permits a first responder to be exposed to, to ingest or inhale, or to have contact with a Schedule 1 controlled substance or chemical substance in the performance of official duties. This act also provides a series of graduated criminal penalties for a violation based on the injury received by the first responder: (1) physical injury to the first responder is a Class C felony; (2) serious physical injury to the first responder is a Class B felony; and (3) death of the first responder is a Class A felony. Effective September 1, 2023

Making a Terrorist Threat (Act 2023-493, HB37)

Representative Jim Hill

This act (1) creates the crime of making a terrorist threat in the first degree and provides that a violation is a Class C felony; (2) creates the crime of making a terrorist threat in the second degree and provides that a violation is a Class A misdemeanor; and (3) repeals the existing crime of making a terrorist threat. Effective September 1, 2023

Criminal Law and Procedure

Deputy Brad Johnson Act (Correctional Incentive Time) (Act 2023-22, SB1)

Senator April Weaver

This act (1) reduces the amount of correctional incentive time a prisoner receives; (2) requires a prisoner remain in a certain classification, which determines the amount of correctional incentive time a prisoner receives, for a longer period of time before moving to a higher classification; (3) provides an additional circumstance in which a prisoner may not be in the highest classification that receives the greatest amount of correctional incentive time;

(4) provides additional circumstances in which a prisoner's correctional incentive time is forfeited; (5) provides additional circumstances in which a prisoner is not eligible to receive correctional incentive time; and (6) requires the Department of Corrections to provide reports including correctional incentive time to the legislature, governor, and attorney general. Effective April 14, 2023

Criminal Enterprises (Act 2023-416, SB143)

Senator Will Barfoot

This act (1) identifies criminal enterprise members; (2) enhances penalties for any criminal activity that benefits, promotes, or furthers the interest of a criminal enterprise; and (3) establishes a mandatory penalty of imprisonment for not less than five years for any firearm possession during the commission of any criminal activity that benefits, promotes, or furthers the interest of a criminal enterprise, and provide enhanced penalties based on the type and use of the firearm. This act also requires a person 16 years of age or older to be tried as an adult for criminal activity related to a criminal enterprise. Effective September 1, 2023

Criminal Conspiracy (Act 2023-461, SB198)

Senator Arthur Orr

This act (1) adds additional offenses that would be subject to the presumptive sentencing guidelines; (2) modifies the criminal penalties for criminal solicitation, attempt, and criminal conspiracy to be a Class D felony if the solicited or attempted offense is a Class C felony, or if the object of the criminal conspiracy is a Class C felony; (3) gives a judge discretion when sentencing a person convicted of a Class C or Class D felony offense; and (4) authorizes a court to revoke probation if the offender failed to complete a court ordered rehabilitation program. Effective July 1, 2023

Child Physical and Sexual Abuse Victim Protection Act (Act 2023-462, SB223)

Senator Vivian Davis Figures

This act provides that for the purposes of the Child Physical and Sexual Abuse Victim Protection Act, which provides certain conditions for the admissibility of out-of-court statements made by victims of certain crimes under 12 years of age or a protected person to include statements made by witnesses of those crimes who are under 12 years of age or protected persons. Effective September 1, 2023

Controlled Substances

Psychoactive Cannabinoids (Act 2023-169, SB66)

Senator Tim Melson

This act (1) prohibits the sale, distribution, marketing, and possession of psychoactive cannabinoids found in hemp, including delta-8 products, to individuals under 21 years of age; (2) provides that any person who sells, distributes, or markets psychoactive cannabinoids to individuals under 21 years of age shall be guilty of a Class B misdemeanor; (3) provides that any individual under 21 years of age who is in possession of psychoactive cannabinoids shall be issued a citation and fined; and (4) requires psychoactive cannabinoids sold in this state to be packaged in child-resistant containers and located in an area in which individuals under 21 years of age are not permitted access. Effective August 1, 2023

Counties and Municipalities

Sheriff Vacancy (Act 2023-164, HB276)

Representative Ron Bolton

This act provides that if the office of sheriff of a county becomes vacant or when certain other circumstances exist in the county, the highest-ranking

(Continued from page 243)

deputy sheriff in the office of the sheriff shall discharge the duties of the sheriff. Effective August 1, 2023

Courts

Attorney Compensation in a Commitment Hearing (Act 2023-61, SB44)

Senator Bobby Singleton

This act provides that in addition to any other fee authorized by law, an appointed attorney in a commitment hearing may be awarded reasonable fees related to pre-appointment consultation and preparation of the petition prior to appointment. Effective July 1, 2023

Court Interpreter Certification (Act 2023-105, HB144)

Representative Jim Hill

This article (1) provides that an individual may become certified as a court interpreter by passing a test created and administered by the Administrative Office of Courts (AOC); (2) authorizes AOC to establish a mandatory certification fee for court interpreters; and (3) authorizes AOC to use the funds collected from the certification fees. Effective August 1, 2023

Creation of Judgeships (Act 2023-315, SB39)

Senator Sam Givhan

This act creates the following new judgeships to be filled at the 2024 General Election: (1) an additional circuit judgeship for the Eleventh Judicial Circuit to be designated as Circuit Judgeship Number 4; (2) an additional circuit judgeship for the Nineteenth Judicial Circuit to be designated as Circuit Judgeship Number 4; (3) an additional circuit judgeship for the Twenty-third

Judicial Circuit to be designated as Circuit Judgeship Number 9; (4) an additional circuit judgeship for the Twenty-eighth Judicial Circuit to be designated as Circuit Judgeship Number 6; (5) an additional district judgeship for Baldwin County to be designated as District Judgeship Number 3; (6) an additional district judgeship for DeKalb County to be designated as District Judgeship Number 2; and (7) an additional district judgeship for Mobile County to be designated as District Judgeship Number 6. This act creates the following new judgeships to be filled at the 2026 General Election: (1) an additional circuit judgeship for the Sixth Judicial Circuit to be designated as Circuit Judgeship Number 7; (2) an additional circuit judgeship for the Nineteenth Judicial Circuit to be designated as Circuit Judgeship Number 5; (3) an additional circuit judgeship for the Twenty-eighth Judicial Circuit to be designated as Circuit Judgeship Number 7; (4) an additional circuit judgeship for the Thirty-seventh Judicial Circuit to be designated as Circuit Judgeship Number 4; (5) an additional district judgeship for Madison County to be designated as District Judgeship Number 5; and (6) an additional district judgeship for Shelby County to be designated as District Judgeship Number 3. This act also: (1) issues a moratorium on the reallocation of judges by the Judicial Resources Allocation Commission until January 1, 2027; and (2) requires the Administrative Office of Courts to annually provide certain statistics for each circuit. Effective May 30, 2023

Compensation of Interim Active-Duty Judges (Act 2023-333, HB40)

Representative Jim Hill

This act (1) increases the compensation received by a retired justice or

judge called to active duty, in addition to his or her retirement benefits, to \$780 per day; (2) limits interim active duty status for a retired justice or judge to 50 calendar days per calendar year; (3) requires that an interim active duty judge complete at least six hours of continuing legal education annually; (4) specifies the conditions under which a retired judge or justice may be called to interim active duty; (5) requires the Administrative Office of Courts to adopt policies and procedures relating to interim active duty judges; and (6) specifies that a retired judge called into interim active duty status under this section is not a public official for purposes of the Code of Ethics for Public Employees. Effective August 1, 2023

Guardian ad Litem Compensation (Act 2023-368, HB244)

Representative Danny Crawford

This act increases the compensation for an attorney appointed to serve as guardian ad litem in a juvenile dependency case from \$2,500 to \$5,000 per case. Effective September 1, 2023

Expense Allowance for Jurors (Act 2023-403, SB99)

Senator Sam Givhan

This act revises the expense allowance paid to jurors for each day of service from \$10 per day plus a mileage reimbursement of \$.05 per mile traveled, to an amount established by the Alabama Supreme Court. Effective September 1, 2023

Notary Publics (Act 2023-548, SB322)

Senator Sam Givhan

This act (1) increases the fee collected by the judge of probate for the commission of a notary to \$25; (2) requires each applicant for notary public

commission to pay a \$10 application fee and complete an application developed by the Alabama Probate Judges Association and the Alabama Law Institute; (3) requires a judge of probate to deny an application for a notary public commission if the applicant is not a resident, has been convicted of certain crimes, is a debtor in a bankruptcy proceeding, is incapacitated, or is unable or unwilling to complete the required training; (4) requires each applicant for a notary public commission to complete a training program prepared by the Alabama Probate Judges Association and the Alabama Law Institute; (5) prohibits a notary public from performing an acknowledgement in any transaction where he or she has a pecuniary interest; (6) increases the bond required of a notary public from \$25,000 to \$50,000; (7) provides further for the acknowledgment of signatures; (8) increases the maximum fee which may be collected for notarial acts performed to \$10; and (9) provides criminal penalties for various violations of laws regulating notaries, including performing a notarial act without a license, charging a fee in excess of the maximum fee, and failing to verify the identity of the principal. Effective September 1, 2023

Economic Development

Site Evaluation Economic Development Strategy (Act 2023-35, SB165)

Senator Arthur Orr

This act (1) authorizes the State Industrial Development Authority to make site-assessment and site-development grants to companies at which the predominant trade or business activity conducted is industrial, warehousing, or research activities, or

which qualifies as a headquarters facility; (2) requires grantees to contribute additional funding for every dollar of grant funds received based on the population of the county in which the site is located; and (3) creates the Alabama Site Development Fund. This act also: (1) provides an annual appropriation to the State Industrial Development Authority; and (2) authorizes the appropriation to be expended on site assessment or site development grants. Effective April 20, 2023

Education

Competitive Bidding for City and County Boards of Education (Act 2023-203, HB65)

Representative Terri Collins

This act (1) increases the minimum amount for city and county board of education contracts subject to competitive bid from \$15,000 to \$40,000; and (2) beginning October 1, 2027, provides a legislative process to increase the minimum threshold based on increases in the Consumer Price Index. Effective August 1, 2023

Environment and Natural Resources

Inspection of Dams and Reservoirs (Act 2023-414, SB284)

Senator Clyde Chambliss

This act (1) provides for the inspection of a participating owner's dams and reservoirs and requires inspecting engineers to assign a hazard potential classification to each dam and reservoir; (2) requires participating owners

of a dam or reservoir to develop and periodically update an emergency action plan and immediately implement the plan in the event of an emergency; and (3) requires participating owners to notify the local emergency management agency of any new dam construction or enlargement. Effective September 1, 2023

Brownfield Cleanup and Remediation (Act 2023-356, HB378)

Representative Chip Brown

This act (1) limits the liability of potentially responsible parties who participate in a voluntary cleanup program; and (2) creates the Brownfield Remediation Reserve Fund and provides for the use of its funds to pay the post-remediation costs with respect to certain properties cleaned up or remediated in accordance with this act, provided the amount does not exceed \$4,000,000 per property. This act also (1) authorizes the owner or owners of an affected property to petition for, and the local governing body to approve by resolution, the creation of a brownfield redevelopment district; (2) provides for the governance of a brownfield redevelopment district by a board of directors appointed by the local governing body; and (3) provides for the power, scope, and authority of a brownfield redevelopment district. Effective September 1, 2023

Family Law

Alabama Adoption Code (Act 2023-92, HB101)

Representative Ginny Shaver

This act repeals the Alabama Adoption Code and replaces it with the Alabama Minor Adoption Code and the Alabama Adult Adoption Code to: (1) provide for jurisdictional and procedural requirements relating to adoptions and adoption contests;

(Continued from page 245)

(2) provide for the communication of courts handling adoption-related proceedings; (3) provide that certain individuals must consent to an adoption and provide limitations as to when consent may be withdrawn; (4) provide for investigative requirements for the adoption of a minor; (5) clarify procedures for a relative or stepparent to adopt a minor; (6) provide procedures to adopt an adult, including that an investigation is not required for the adoption of an adult; and (7) provide procedures related to adoption records. Effective January 1, 2024

The Colby Act (Supported Decision-Making Agreements) (Act 2023-134, SB55)

Senator Arthur Orr

This act (1) provides conditions by which an adult may enter into a supported decision-making agreement as an alternative to a guardianship or conservatorship; (2) provides for the contents and scope of a supported decision-making agreement and provides a model form; (3) sets requirements for a supporter of an adult with a supported decision-making agreement and prohibits a supporter from exerting undue influence, receiving compensation for his or her services, or obtaining information about the adult without the adult's consent; (4) provides for the termination and revocation of a supported decision-making agreement; and (5) requires mandatory reporting if an individual suspects an adult with a supported decision-making agreement is being abused, neglected, or exploited. Effective August 1, 2023

Health

Harold Sachs and Anne Roberts Act (Hospital Visitation) (Act 2023-24, SB113)

Senator Garlan Gudger

This act (1) provides that each patient of a health care facility has the right to be visited during the facility's visiting hours; (2) requires each health care facility to establish a visitation policy (3) prohibits a health care facility from requiring visitors to show proof of vaccination; (4) allows each patient to designate one essential caregiver each day who is entitled to two hours of daily in-person visitation; (5) provides a procedure for an individual to designate an essential caregiver on behalf of a patient who is incapacitated; (6) provides that clergy members have the same visitation rights as essential caregivers; (7) requires each health care facility to allow visitation in certain situations; (8) requires each health care facility to provide its visitation policies to the Alabama Department of Public Health when applying for licensure and require the visitation policies to be published online; and (9) exempts certain health care facilities from the visitation requirements. Effective April 18, 2023

Law Enforcement

Sexual Assault Case Reporting (Act 2023-197, HB21)

Representative Chip Brown

This act (1) requires every law enforcement agency and the Alabama Department of Forensic Sciences to submit an annual report containing certain data relating to sexual assault cases to the Alabama State Law Enforcement Agency; and (2) requires the Alabama State Law Enforcement Agency to submit an annual summary report relating to sexual assault cases to the chairs of the House and Senate Judiciary Committees. Effective August 1, 2023

Violations of Parole or Probation (Act 2023-475, SB157)

Senator Chris Elliot

This act allows a law enforcement officer to arrest a parolee or probationer without a warrant if he or she violates conditions of parole or probation in the presence of the arresting officer. This act also (1) requires the Board of Pardons and Paroles and any sentencing court to report to the Alabama State Law Enforcement Agency (ALEA) the conditions of parole or probation for any individual released on parole or probation; and (2) requires ALEA to make the conditions available to law enforcement officers or other authorized persons through the Law Enforcement Tactical System. Effective September 1, 2023

Alabama Bail Reform Act of 1993 (Act 2023-476, SB213)

Senator David Sessions

This act (1) allows a sheriff or jailer to accept certain filing fees; (2) limits the definition of "property bail" to apply to real property; (3) prohibits the charge of a surety for the bondsman's process or for a certified copy of the bond; (4) increases the time frame for a court to set a hearing relating to bond forfeiture

from 90 days to 120 days, the time frame for a written response from 28 days to 30 days after service of notice, and the time frame in which a court has full power and jurisdiction over procedures under the Alabama Bail Reform Act from six months to one year; (5) authorizes a surety to sign for a forfeiture; (6) requires professional surety companies to annually submit proof of licensure to the presiding circuit judge; (7) requires corporate surety bonds and escrow agreements made after September 1, 2023, in counties with populations of 200,000 or more to be in the amount of \$50,000; (8) prohibits a professional bondsman from owning a professional bail company until he or she has been licensed for at least three years; (9) provides procedures for the sale of a bail bond company to an unlicensed individual in the event the owner dies; and (10) provides that any individual who provides false information to the court or surety on any bond form or contract shall be guilty of a Class A misdemeanor, and any surety who exchanges sexual services in exchange for bail bond services shall be guilty of a Class C felony. Effective September 1, 2023

Disclosure of Recordings Made by Law Enforcement (Act 2023-507, HB289)

Representative Juandalynn Givan

This act (1) provides that recordings captured by a body-worn camera, dashboard camera, or other video or audio recording by or on behalf of a law enforcement agency are not personnel records of the state or local law enforcement agency; (2) provides circumstances under which such recordings are required to be disclosed, including when a written request is received by any individual, or his or her personal representative, who is the subject of the recording, and the personal representative of any minor,

adult individual under lawful guardianship, incapacitated adult, or deceased individual who is the subject of the recording; and (3) authorizes the custodial law enforcement agency to either disclose the requested recording or, if the disclosure would affect an ongoing investigation or prosecution, notify the requestor of the decision not to disclose the recording. Effective September 1, 2023

The Cade Noah Act (Training On Individuals with Sensory Needs) (2023-354, HB356)

Representative Leigh Hulsey

This act (1) requires the Alabama Peace Officers' Standards and Training Commission to require each certified law enforcement officer to complete one hour of training on interacting with individuals with sensory needs or invisible disabilities every other year; (2) requires the commission to collaborate with a nonprofit company to provide the training at no cost; and (3) authorizes the commission to adopt rules to implement and administer the act. Effective January 1, 2024

Liability

Dram Shop Liability (Act 2023-25, SB104)

Senator Chris Elliot

This act (1) provides that a person who sells, furnishes, or serves alcoholic beverages to an individual of lawful drinking age shall not be liable for injury or death caused by the intoxication of the individual, provided the person did not knowingly sell, furnish, or serve the alcoholic beverage to the individual while the individual was visibly intoxicated; and (2) specifies that the establishment of a "knowing" element establishes a new standard of liability for damages resulting from

intoxication due to alcoholic beverages, repealing in effect the former strict liability standard of liability. Effective April 19, 2023

Alabama Medical Liability Act of 1996 (Act 2023-103, HB162)

Representative Ed Oliver

This act provides that, for the purposes of the Alabama Medical Liability Act of 1996, the term "health care provider" includes emergency medical services personnel and any emergency medical provider service. Effective August 1, 2023

Public Road and Bridge Contractors (Act 2023-316, SB159)

Senator Clay Scofield

This act (1) further provides for the exceptions to the general rule of nonliability of a contractor who constructs or repairs a public road or bridge following the project's acceptance by the awarding authority; (2) provides that in an action for injury, damages, or wrongful death against an awarding authority or its contractors arising from any negligent act or omission in the construction or maintenance of a public road, where it is established that the operator of the vehicle was driving under the influence, texting while driving, or traveling at a rate of 25 or more miles per hour over the applicable speed limit, there is a rebuttable presumption that the prohibited conduct was the proximate cause of the injury, damages, or wrongful death, but provide that the presumption may be overcome by the plaintiff establishing that the prohibited conduct was not the proximate cause of injury, damages, or death; and (3) requires in such complaints a detailed specification and factual description of each act and omission alleged. Effective August 1, 2023

(Continued from page 247)

Motor Vehicles

Smoking in a Vehicle (Act 2023-93, HB3)

Representative Rolanda Hollis

This act (1) prohibits smoking or vaping in any motor vehicle, in motion or at rest, when a child 14 years of age or younger is present in the vehicle; (2) provides a fine for a violation of not more than \$100; and (3) provides that a violation may be charged only as a secondary violation. Effective August 1, 2023

Military Members Motor Vehicle Insurance (Act 2023-127, HB210)

Representative Rhett Marques

This act allows active-duty military members who have a motor vehicle registered in Alabama but are assigned to reside in another state to satisfy state mandatory motor vehicle liability requirements by purchasing liability coverage in the state where he or she is on active military duty or assignment. Effective January 1, 2024

Suspension of Driver License (Act 2023-337, SB154)

Senator Will Barfoot

This act (1) provides that a judge may order the suspension of an individual's driver license for failure to appear under the following conditions: a. the individual violated his or her written bond to appear for any pre-adjudication court date or trial date; or b. the individual failed to appear on two or more occasions when the court appearance was based on a court's post

adjudication compliance review of conditions ordered; or c. the individual failed to make three or more court ordered payments for a fine, fee, or court costs; and (2) requires the Alabama State Law Enforcement Agency to add points on an individual's driver license upon the receipt from a court that the individual was convicted of or entered a plea of guilty to a traffic violation. Effective October 1, 2023

Public Contracts

Environmental, Social, and Corporate Governance (Act 2023-409, SB261)

Senator Dan Roberts

This act (1) prohibits governmental entities from entering into certain contracts for goods and services with companies that boycott businesses because the business engages in the fossil fuel or firearm industry, does not meet certain environmental or corporate governance standards, or does not facilitate access to abortion or sex or gender change surgery; (2) prohibits governmental entities from requiring a company to engage in economic boycotts or other actions that further social, political, or ideological interests or penalizing a company for its refusal to engage in economic boycotts; (3) requires the attorney general to seek to prevent federal laws or actions from penalizing or limiting the activities of companies or residents based on the economic boycott criteria; and (4) authorizes the attorney general to enforce this act and investigate alleged violations. Effective September 1, 2023

Property

Termination of Uneconomic Trusts (Act 2023-176, SB11)

Senator Will Barfoot

This act (1) increases from \$50,000 to \$100,000 the minimum threshold dollar amount at which the trustee of trust property may deem a trust to be uneconomic and terminate the trust under certain circumstances; and (2) beginning January 1, 2024, allows the minimum threshold to be increased or decreased in subsequent years based on changes to the Consumer Price Index. Effective May 12, 2023

Wholesale Residential Real Estate Disclosures and Long-Term Right-to-List Agreements (Act 2023-201, SB228)

Senator Dan Roberts

This act (1) requires the buyer of a single-family residential property to make certain disclosures to homeowners and other interested parties if the buyer intends to acquire an equitable interest and assign the interest for a fee; (2) provides that any individual who violates this act shall be guilty of a Class C misdemeanor and may be financially liable to the person to whom disclosure is required; (3) designates an unfair service agreement as a deceptive act under the Alabama Deceptive Trade Practices Act; (4) deems unenforceable certain unfair service agreements that purport to establish a long-term right to list between real estate companies and residential real estate owners; (5) provides any interested party with the right to seek a court order declaring a service agreement void; and (6) holds a service provider who records an unfair

service agreement liable to an affected party for \$10,000 in damages and other costs and attorney fees as proven. Effective August 1, 2023

State Agencies

Personal Privacy Protection Act (Act 2023-128, SB59)

Senator Rodger Smitherman

This act (1) prohibits public agencies from collecting, disclosing, or releasing certain personal information about members of, volunteers for, and financial and nonfinancial supporters to nonprofit organizations, except as required by law; (2) allows civil damages and injunctive relief for a violation; and (3) provides that any person who knowingly violates this act shall be guilty of a Class C misdemeanor. Effective August 1, 2023

Digital Currency Prohibited (Act 2023-561, SB330)

Senator Dan Roberts

This act prohibits governmental agencies from using Central Bank Digital Currency as payment and from participating in testing the use of the currency by the Federal Reserve. Effective September 1, 2023

State Employees

Exempt Service Employees (Act 2023-538, SB294)

Senator Robert Stewart

This act increases the number of exempt service employees allowable in each agency to three employees, provided that the Department of Conservation and Natural Resources, the Department of Corrections, the Department of Human Resources, the Department of Mental Health, the De-

partment Public Health, the Department of Revenue, the Department of Transportation, and the Alabama State Law Enforcement Agency shall be entitled to an additional exempt employee. Effective September 1, 2023

State Ethics Commission

Required Disclosure of Exculpatory Evidence (Act 2023-543, SB103)

Senator Arthur Orr

This act (1) provides that prior to any hearing before the State Ethics Commission for a violation of the Code of Ethics for Public Employees, a lawyer or prosecutor assigned to or employed by the commission shall provide to the defendant-respondent the complaint against the defendant and any statement, evidence, or information received from the complainant, witnesses, or other individuals or discovered during the course of investigation; and (2) provides that this required disclosure of exculpatory evidence is not subject to the secrecy and nondisclosure of information requirements of the ethics laws. This act also clarifies that the statutory whistleblower protections which prohibit a public employer from discharging, demoting, transferring, or otherwise discriminating against an employee for reporting an ethics violation or giving testimony concerning an alleged ethics violation apply regardless of whether the employee is the individual who filed the ethics complaint. Effective September 1, 2023

State Government

Unconscionable Pricing During an Emergency (Act 2023-122, SB62)

Senator Sam Givhan

This act authorizes the governor or the legislature to specify the affected areas and time periods to which a prohibition against imposition of unconscionable pricing during a declared state of emergency would apply. Effective August 1, 2023

Legislature and Legislative Council (Act 2023-224, SB222)

Senator Sam Givhan

This act (1) provides that the regular session of the legislature for the first year of the legislative quadrennium commences the first Tuesday of February; (2) designates as state property and authorizes the legislature to control the usage of a parking lot used by personnel in the Alabama State House, and all of an additional lot adjacent to the Alabama State House in the City of Montgomery; (3) provides additional time for the Contract Review Committee to review a contract; (4) redacts certain contracts for professional services executed by the attorney general until the conclusion of the litigation; (5) revises membership of the Joint Legislative Committee on Finances and Budgets to include the members of the Senate Committee on Finance and Taxation General Fund and the House Committee on Ways and Means General Fund; (6) provides that if a vacancy occurs in the Office of the Lieutenant Governor, the president pro tempore of the senate shall assume the budget, personnel, and statutory duties for the remainder of the term of office; (7) provides further for the roll of the code commissioner and the duties of the Legislative Council and the Legislative Services Agency; (8) authorizes the Legislative Council to contract with an appropriate party to construct and maintain a building that, upon completion, would be designated as the Alabama State House; and (9) provides that the term of the speaker of the house of representatives continues after the election when house members are elected until a new speaker is elected and provide that, in the event of a vacancy in the

(Continued from page 249)

office of the speaker, the speaker pro tempore of the house of representatives shall assume the duties of the speaker. Effective August 1, 2023

Division of Procurement (Act 2023-542, SB100)

Senator Arthur Orr

This act (1) changes the name of the Office of the Chief Procurement Officer to the Division of Procurement; (2) authorizes the chief procurement officer to make purchases, contracts, or leases for any county, municipal corporation, local board of education, or other local public body at the request of the local public body; (3) exempts from the state procurement code certain supplies and services that, by their nature, are impossible to award by competitive process; (4) provides for emergency procurements and the review of those procurements by the Contract Review Legislative Oversight Committee; (5) exempts the Alabama Medicaid Agency from the article for the purposes of procuring certain professional service providers; (6) revises the definition of professional services to include the management and administration of occupational licensing boards; (7) authorizes the procurement of supplies, services, and professional services by district attorneys and sheriffs; and (8) provides for the procurement of physicians retained to provide medical services to the State of Alabama. Effective June 15, 2023

Taxation

One-Time Tax Rebate (Act 2023-377, SB86)

Senator Arthur Orr

This act (1) provides a one-time refundable income tax credit to qualified taxpayers who filed an Alabama individual income tax return for the taxable year beginning January 1, 2021, in the amount of \$150 for single, head of family, and married filing separate, and \$300 for married filing joint; (2) creates the Refundable Tax Credit Fund in the state treasury and requires the state comptroller to direct the amount necessary to implement this act to the fund from the Education Trust Fund; (3) requires the Department of Revenue to begin issuing refundable income tax credits no sooner than November 30, 2023; and (4) provides that refundable credits are not taxable for Alabama income tax purposes, subject to interest accrual, or subject to interception against any liability. Effective June 1, 2023

Overtime Pay Exempt from Taxation (Act 2023-421, HB217)

Representative Anthony Daniels

This act (1) provides that for the tax years beginning after December 31, 2023, and ending prior to June 30, 2025, any gross income received by a full-time, hourly wage-paid employee for overtime work performed in excess of 40 hours in a week is exempt from the state income tax; and (2) requires each employer to provide information to the Department of Revenue about the total amount of overtime provided to such full-time hourly wage-paid employees. Effective January 1, 2024

One-Time Tax Rebate (Act 2023-511, HB175)

Representative Danny Garrett

This act (1) provides a one-time refundable income tax credit to qualified

taxpayers who filed an Alabama individual income tax return for the taxable year beginning January 1, 2021, in the amount of \$150 for single, head of family, and married filing separate, and \$300 for married filing joint; (2) requires the Department of Revenue to begin issuing refundable income tax credits no sooner than November 30, 2023; and (3) provides that the refundable income tax credits are not taxable for Alabama income tax purposes, not subject to interest accrual, and not subject to interception against any liability. Effective June 15, 2023

Taxation – Food Tax Reduction (Act 2023-554, HB479)

Representative Danny Garrett

This act (1) reduces the state sales and use tax rate on food from four percent to three percent; (2) contingent upon the satisfaction of certain estimated growth requirements in the total net receipts to the Education Trust Fund, further reduces the states sales and use tax rate on food to two percent, effective September 1, 2024, provided, if the growth requirements are not satisfied, the state sales and use tax rate on food will be reduced to two percent in a subsequent fiscal year when the growth requirements are satisfied; (3) establishes each county or municipality's tax rate on food as of the effective date of this act as the general or retail sales tax rate on food, and prohibits any county or municipality from levying an additional sales and use taxes on food; and (4) authorizes counties and municipalities to reduce, by ordinance or resolution, the tax rate on food by 25 percent in any year in which the growth in that county or municipality's general fund exceeds two percent over the prior year. Effective June 15, 2023 ▲

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Marc A. Starrett

Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.



J. Thomas Richie

J. Thomas Richie is a partner at Bradley Arant Boulton Cummings LLP, where he co-chairs the class action team. He litigates procedurally-complex and high-stakes matters in Alabama and across the country. Richie is a 2007 summa cum laude graduate of the Cumberland School of Law and former law clerk to the Hon. R. David Proctor of the United States District Court for the Northern District of Alabama.

RECENT CRIMINAL DECISIONS From the United States Supreme Court

Wire Fraud; Jury Instructions

Percoco v. United States, 143 S. Ct. 1130 (2023)

The Court reversed the defendant's wire fraud conviction under 18 U.S.C. § 1343. The trial court's oral charge failed to sufficiently define "the intangible right of honest services" so that ordinary people can understand what conduct is prohibited or in a manner that does not encourage "arbitrary and discriminatory enforcement."

Wire Fraud; "Right-to-Control" Theory

Ciminelli v. United States, 143 S. Ct. 1121 (2023)

The Court reversed the defendant's wire fraud conviction under 18 U.S.C. § 1343, which was premised on the "right-to-control" theory that prohibits one from scheming to deprive the victim of "potentially valuable economic information" "necessary to make discretionary economic decisions." Because such information is not a traditional property interest, it cannot serve as a basis for liability under § 1343.

Foreign Sovereign Immunities Act

Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940 (2023)

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.*, did not provide a Turkey-owned bank with immunity from criminal prosecution for conspiring to evade United States sanctions against Iran. The Act governs claims of immunity in civil actions against foreign states and their instrumentalities, but it does not provide immunity to parties from criminal prosecution.

From the Alabama Court of Criminal Appeals

Double Jeopardy; Dismissal Without Prejudice

State v. Burton, CR-20-0844 (Ala. Crim. App. May 5, 2023)

The trial court erred in dismissing the defendant's second murder indictment on the ground that the indictment, which followed the pretrial dismissal of his first indictment "without prejudice," constituted double jeopardy. The first indictment was dismissed due to insufficient evidence following a hearing (in violation of Ala. R. Crim.

P. 13.5 (c)(1), an error invited by the state by its production of evidence at the hearing and failure to object), but the defendant was not placed into jeopardy because he faced no risk of a determination of guilt before trial. Under Alabama law “that risk generally does not arise until a jury has been impaneled and sworn and the indictment is read to the jury.”

Ineffective Assistance; Control of Witness

Capote v. State, CR-20-0537 (Ala. Crim. App. May 5, 2023)

The court denied postconviction relief on the petitioner’s numerous ineffective assistance of counsel claims asserted pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). Among those claims, the court found no ineffectiveness in defense counsel’s failure to control the profanity-laced testimony of the petitioner’s sibling at the petitioner’s capital murder trial. The court found no authority imposing a duty on counsel to control a witness’s profanity, noting that “it is generally the trial court – not counsel – that has the duty to control a witness’s behavior.” Further, defense counsel’s closing argument indicated that he had made a strategic decision to allow the sibling’s vulgar descriptions of his family to emphasize the petitioner’s traumatic childhood. An attempt to influence the jury through the use of emotional testimony is a reasonable trial strategy.

Ineffective Assistance; Sleeping Juror

Young v. State, CR-21-0393 (Ala. Crim. App. Mar. 24, 2023)

Among many other holdings, the court affirmed the summary dismissal of the petitioner’s claim that his trial counsel rendered ineffective assistance by failing to pursue “adequate remedies” when a juror slept through portions of his trial. The petitioner’s failure to identify the juror and bare assertion that trial counsel should have moved for “remedial action,” without identifying what action should have been taken, was insufficient to meet the stringent pleading standards of Ala. R. Crim. P. 32.6(b). Further, the court noted that a decision against seeking the replacement of a sleeping juror may be strategically sound and thus not ineffective.

Amendment to Ala. R. Crim. P. 32 Petition; Ineffective Assistance

Travis v. State, CR-18-0973 (Ala. Crim. App. Mar. 24, 2023)

Following an evidentiary hearing on an Ala. R. Crim. P. 32 petition, ineffective assistance of counsel claims that were first asserted in a post-hearing brief and were based on the examination of a witness at the hearing are not preserved

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(Continued from page 253)

for appellate review. The presentation of new claims in a post-hearing brief is not the equivalent of properly amending a petition under Ala. R. Crim. P. 32.7(b). The court denied relief on the petitioner's claim that his defense counsel rendered ineffective assistance by not introducing evidence to show that the victim's blood was not found on the petitioner's clothing and footprints at the scene did not match his shoes. Counsel's decision to refrain from introducing that evidence could have resulted from a strategy to prevent the state from rebutting it with the defendant's statement that he was at the victim's house when she was killed.

Newly Discovered Evidence; Ineffective Assistance; Equitable Tolling

Wallis v. State, CR-2022-0984 (Ala. Crim. App. May 5, 2023)

The petitioner failed to meet the stringent requirements of Ala. R. Crim. P. 32.1 to show that newly discovered evidence entitled him to postconviction relief. His claim that witness affidavits showed a "plausible motive" for the victim to falsely testify against him were simply impeachment evidence, and newly discovered evidence "which merely tends to discredit an adverse party or his witnesses" cannot require a new trial under Rule 32.1. The court also rejected the petitioner's request for equitable tolling and his argument that Ala. R. Crim. P. 32.2(c)'s limitation period was inapplicable to his ineffective assistance of counsel claims. It noted that ordinary "difficulties of prison life," such as restricted access to legal materials or assistance, do not provide a basis for equitable tolling, and Rule 32(c) is "clear and unambiguous" that its one-year limitation period governs ineffective assistance claims.

Post-Release Supervision for Child Sex Offense

Johnson v. State, CR-21-0291 (Ala. Crim. App. May 5, 2023)

While affirming the defendant's convictions of first-degree sodomy and sexual abuse of a child under the age of 12, the court remanded for resentencing on the sodomy convictions. The 99-year sentences imposed on the sodomy convictions fell within the proper statutory range of punishment for these Class A felonies, but Ala. Code § 13A-5-6 (c) requires an additional penalty of not less than 10 years of post-release supervision for sexual offenses involving a child victim.

Provocation Manslaughter; Attempted Murder

Crayton v. State, CR-20-1006 (Ala. Crim. App. May 5, 2023)

The state's evidence was sufficient to support the defendant's attempted murder conviction because the jury could infer his intent to kill from his pointing of a gun at the victim and firing it. The use of a deadly weapon against a victim is "in and of itself sufficient evidence of the defendant's intent to kill." The court also rejected the notion that the defendant's

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provocation manslaughter and attempted murder convictions were mutually exclusive. The jury could “logically and legally” determine that the defendant intended to kill one victim and did so under the heat of passion caused by a legally recognized provocation, while also finding that he intended to kill his second victim and committed an overt act toward doing so. The court noted that the defendant had made “no attempt to explain how a finding of provocation could have legally mitigated the attempted-murder charge.”

Brady; “Straight” Sentence

***Guice v. State*, CR-2022-0965 (Ala. Crim. App. May 5, 2023)**

The defendant failed to show that the state violated *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing evidence that his victim had marijuana in his vehicle at the time of the shooting. The state’s evidence at trial included testimony from a police officer regarding marijuana in the victim’s vehicle, and the officer was recalled during the defense case-in-chief and again questioned about the marijuana. The evidence was thus disclosed during trial, rather than after the trial, as is required for proof of a *Brady* violation. However, the court remanded for a new sentencing because the defendant’s “straight” 10-year sentence for shooting into an unoccupied vehicle, a Class C felony, is not permitted under Ala. Code §§ 13A-5-6(a)(3) and 15-18-8(b) in a non-habitual felony offender case.

Unanimity Instruction

***Colburn v. State*, CR-2022-0721 (Ala. Crim. App. May 5, 2023)**

In cases where evidence of multiple acts is used to prove a single offense, the defendant is entitled to have the state elect a single act on which it is relying for a conviction or to have the jury instructed that each juror must agree that the same underlying criminal act was proven beyond a reasonable doubt. The court questioned whether the jury instruction in the defendant’s rape and sexual abuse trial was sufficient, but any error was harmless because the record showed that the jurors must have both unanimously rejected the defense and unanimously concluded from the victims’ testimony that all the incidents occurred.

(Continued from page 255)

Abuse of Corpse; Obstruction of Justice

Vandusen v. State, CR-2022-0571 (Ala. Crim. App. May 5, 2023)

The defendant's acts of dragging his deceased victim's body through her house and yard and hiding it in a wheelbarrow were sufficient for proof that he abused a corpse, a violation of Ala. Code § 13A-11-13. A defendant who knowingly conceals a corpse without arranging for a proper burial has treated it in a way that would outrage ordinary family sensibilities as prohibited by § 13A-11-13. The defendant also violated Ala. Code § 13A-8-194's prohibition against the use of a false identity to obstruct justice when he provided a false name to a police officer who asked him to identify himself, regardless that his true name was quickly ascertained, and he was arrested. The statute provides that the offense is committed if a person uses false information to obstruct justice, "not

that he violates the statute if he uses false information and does obstruct justice." (emphasis added)

Alabama Armed Services Accommodation Act; Confrontation Clause

Bragg v. State, CR-21-0361 (Ala. Crim. App. Mar. 24, 2023)

The two-way live video testimony of the robbery victim and eyewitness, both active-duty officers in the French Navy, complied with the Alabama Armed Services Accommodation Act, Ala. Code § 12-21-135.1, which permits such testimony from active-duty military members unable to attend court proceedings in person. The testimony was reliable, given under oath, subject to cross-examination, and in view of the jury and defendant, and thus did not violate the Sixth Amendment's Confrontation Clause.

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Criminal Contempt; Subpoena Service

***Grandquest v. State*, CR-2022-1067 (Ala. Crim. App. Mar. 24, 2023)**

The criminal contempt defendant's reply of "Email received" to electronic mail containing a subpoena for him to testify in a criminal case was not a waiver to the service of the subpoena, and the service of a subpoena via electronic mail is not permitted under the Alabama Rules of Criminal Procedure or statute. There was thus no lawfully issued subpoena that could form the basis for the defendant's criminal contempt charges under Ala. R. Crim. P. 33.3.

Pretrial Dismissal of Charges

***Town of Brookside v. Rowser*, CR-2022-0505 (Ala. Crim. App. Mar. 24, 2023)**

On appeal from municipal court for a trial *de novo*, the trial court violated Ala. R. Crim. P. 13.5 in *sua sponte* dismissing the defendants' charges based on the municipal police

department's "the lack of credibility and public trust[.]" There is no procedure in Alabama for the trial court to dismiss charges based on a lack of sufficient evidence.

Self-Defense

***Peterson v. State*, CR-2022-0642 (Ala. Crim. App. Mar. 24, 2023)**

There was no error in the denial of the defendant's request for a self-defense instruction, where that instruction would have been inconsistent with his defense strategy.

"Reasonable Police Officer" Self-Defense Standard

***Darby v. State*, CR-20-0919 (Ala. Crim. App. Mar. 24, 2023)**

In this murder case involving a police officer defendant, the trial court erred in not instructing the jury that it was required to consider his use of deadly force from the perspective of a reasonable police officer in the same situation. ▲

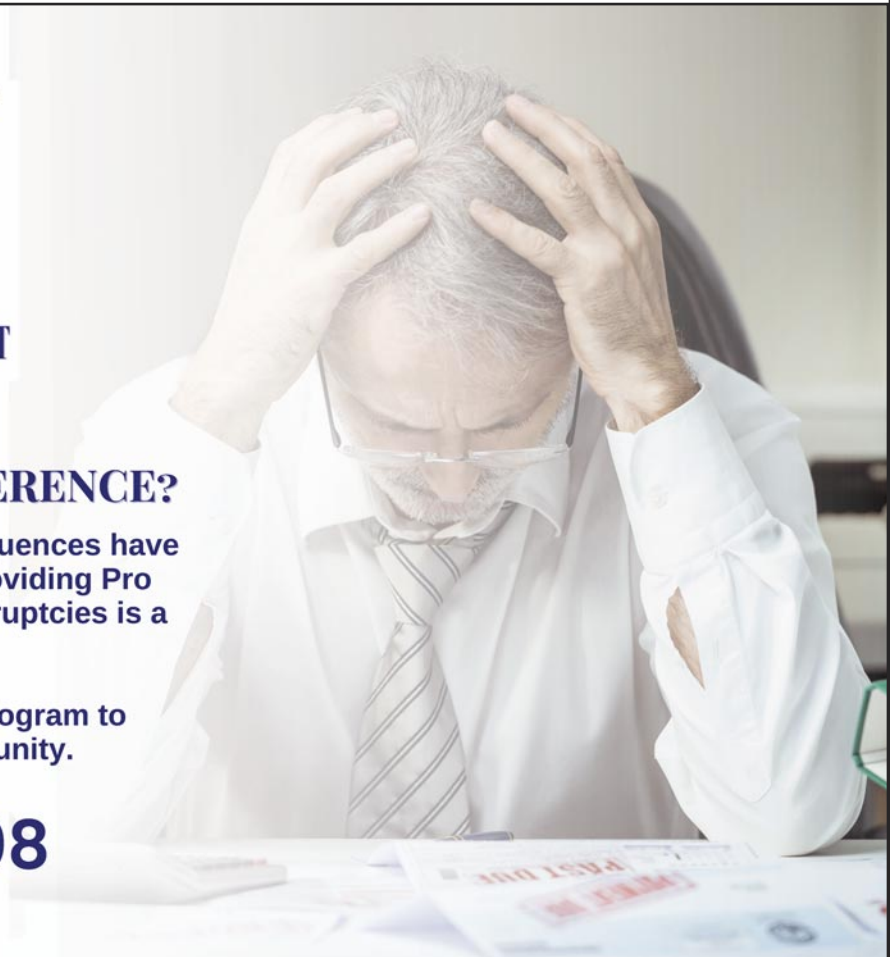


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Please email announcements to
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About Members

The Gregory Law Firm PC announces that the firm opened a second office at 600 Republic Centre, 633 Chestnut St., Chattanooga 37450.

Hunter Hodges announces the opening of **Hunter Hodges, Attorney at Law LLC** with offices at 1924 7th St., Tuscaloosa 35401 and 3789 Cathedral Caverns Hwy., Grant 35747.

Clayton R. Tartt announces the opening of **Tartt Law LLC** at 2314 University Blvd., Tuscaloosa 35401.

Among Firms

Balch & Bingham announces that **Hyde Carby** joined as a partner in the Birmingham office.

Brockwell Smith LLC of Birmingham announces that **Will Hall** joined as an associate.

Dentons Sirote announces that **Jack Amster** joined as an associate in the Birmingham office.

Fish Nelson & Holden LLC of Birmingham announces that **Erin Agricola** joined as an associate.

Fullan & Fullan announces the opening of the Fairhope office at 50 N. Greeno Rd., Ste. B, Fairhope 36532. Phone (205) 251-8596.

Gilpin Givhan PC of Montgomery announces that **David B. Wisdom, Jr.** joined as an associate.

Hernandez and Associates Law Firm of Mobile announces that **Steven S. Smith** retired from the U.S. Social Security Administration's Office of Hearings Operations and joined the firm.

Mark A. Jackson PC of Huntsville announces that **Miller S. Jackson** joined as an associate.

Legal Services Alabama announces that **Farah Majid** is assistant director of advocacy, and **Rae Bolton** is managing attorney of the Birmingham office.

M.S. McNair PC of Mobile announces that **Samuel C. Elmore** joined as an associate.

Sanders & Williams of Birmingham announces that **Logan Griffith** joined as an associate.

Stanley & Associates of Irondale announces that **Jennifer Scruggs** is an equity partner. ▲

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